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GENERAL AND COMPARATIVE JURISPRUDENCE.

IN NINE LECTURES.

BY

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LEGUM LEGIS . . . cum brevitate, si potero, consequar. Leges autem a me edentur non perfectæ ; nam esset infinitum, sed ipsæ summæ rerum atque sententiæ "

—CICERO ; *De Legibus.* Lib. ii.

There are in nature certain fountains of justice, whence all civil laws are derived, but as streams, and, like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary, according to the regions and governments where they are planted, though they proceed from the same fountains "

—BACON, *Advancement of Learning.* Book ii

" La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre, et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette raison humaine "

—MONTESQUIEU *L'esprit des Lois* Liv. i.

2570

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FAMILY RIGHTS.

I.—SAVIGNY'S GENERAL ANALYSIS.

1. *The Law of Family*—In the relation of the individual to other and extraneous individuals, treated of in the *law of things*,[1] each individual, as Savigny points out, must be viewed as in himself a separate finished whole; so that each, in his abstract personality, stands opposed to every other, as a complete stranger, however similar be their nature. Altogether different from this is the possible relation to external persons, treated of in the law of family. Here we consider the individual man, not as a being existing for himself, but as a member of the organic whole of united humanity, and his connection with that whole is constantly maintained through determinate individuals, with whom a peculiar kind of legal relation exists.

1 Including *Security*, or Universal Personal Rights, as of life, liberty, reputation, &c., the *pure* law of *Property*, without its applications to family, or succession; and Obligations *ex contractu*, or primary rights *in personam*,—that is, as affecting independent external individuals See *Outline of a Course of Lectures*, appended to Prof *Austin's Province of Jurisprudence*

This relation exhibits the individual as an incomplete being, standing in need of amendment, and having his defects supplied in a great natural connection. The incompleteness of the individual shows itself in two different forms : 1st, in the separation of the sexes, each of which, considered singly, contains human nature only defective,—to which belongs the completion of the individual through marriage ; 2nd, in the gradual development, and in the limited existence of the individual, which again needs the recognition of supplementary obligations ;—the helplessness of the individual at the commencement of life being supplied by support in infancy, and subsequently by education ; and the defect arising from the transitory nature of life being supplied by the propagation of the race, through which a continued duration is procured, not merely for the species, but for the individual also.

2. *Elements of the family relation.*—A necessity independent of positive law, must be attributed to the natural relations of family, which, extending from within over the limits of human nature, are of univeral existence ; although the particular shape in which they come to be recognised in different nations is multifarious. This natural relation is at the same time a moral relation ; and since it ultimately assumes the form of law, each family relation maintains three inseparably united shapes, the natural, the moral, and the legal, of which the last is much the smallest, since the more important portions of their nature belong to a totally different sphere from that of Law.

3. The *natural* element must not be understood as being on an equal footing with the moral; or as capable of attaining a self-existing mastery. The higher moral law, which ought to penetrate and overrule all the parts of man's nature, presides over the natural instinct: not that the latter may be weakened or annihilated; but that it may be raised to a participation in the higher element of the human being.

4. *Importance of the moral element.*—To the essence of marriage belong fidelity and devoted attachment, and to the paternal power, obedience and reverence; but these, in themselves most important elements of such relations, are placed under the protection of morality, not of law. And the noble use which the father should make of his power in the family, may also be left to the care of morality alone; in which case, though not probable, it is at least possible, that the erroneous or improper use of the paternal power may raise the question, whether there should not be a rule of law to keep it within proper bounds. Hence we should have but an imperfect and very unreliable knowledge of the condition and state of family relations in a nation, if we merely looked into the rules of law prevalent in that department, without regarding the moral habits of the people, which often supply the place of laws Some modern writers, overlooking this connection, have raised a groundless complaint against the Roman law of family as a heartless tyranny. They have not reflected, as Savigny observes, that among no nation of antiquity

was the mother so much honored, as among the Romans; and that any actual servile degrading treatment of the son was incompatible with the constitution of the state, which admitted him to the enjoyment of all political rights, and to the capacity of holding the highest offices of the magistracy, unconstrained by the paternal power. Sir Thomas Strange makes a similar remark, when contrasting the rigid letter of the Hindu law of family, as conceived by the Brahminical jurists, with its more humane actual practice as influenced by the moral habits of the people.[2]

2 *Professor Wilson*, in his criticisms on Mill's preliminary dissertation, sufficiently illustrates the danger, against which Savigny above cautions the candid enquirer, of merely looking into the rules of law without regarding the moral habits of the people. Manu, who probably wrote as a *Brahmachary*, or celibate, without any proper knowledge of the sex, says very dreadful things of women in general, and still more fearful things of particular vicious specimens :—all of which Mr. Mill, with a heroic disregard of consequences, reproduces as evidence in favor of his theory of Hindu barbarity; and supports with the fable from the *Hitopadesh* of the Brahman who in his sportive *vrutha-manorath*, or castle building, indulges in a blissful vision of having *four quarrelsome wives at the same time!* Wilson very properly remarks that the literature of most countries would furnish passages equally derogatory to the sex; but that no one should think of quoting such occasional sarcasms as the language of universal opinion. "If," he says, "instead of the language of law or satire, we look to the portraits of women painted by the Hindus themselves, in their tales, their plays, and poems, we shall find them invariably described as amiable, high-principled, modest, gentle, accomplished, intelligent; as exercising a very important influence upon men; and as treated by them with tenderness and respect.

5. *Compound character of family rights.* — Every family relation, considered as a natural-moral tie, is but a reciprocal personal connection between individual human beings *(inter personas)*; but considered from a legal, or juridical point of view, it is also a relation of one person to all others *(adversus omnes)*, because, in its proper nature, it consists in the claim of a right to general recognition. Thus, for example, a father, in virtue of his paternal power, has the claim of right, that the existence of this power shall be recognised by every one, who contests it; and this claim of right proceeds against the son, neither more nor less, than against every third person. But this juridical relation, once acknowledged, may serve as a foundation for multifarious other claims, to property, inheritance, &c.

6. *Their juridical nature and influence.*—The substance of the juridical element consists merely of what concerns each relation *per se*; and, in examining in detail the nature of each institution, will be found more particularly to embrace, the mode of its origin, the conditions of its existence, and the grounds of its dissolution. This holds equally of marriage, of paternity, and of consanguinity or kindred. But there also enters into each the important influence which the same exercises, out of its own proper limits, over other juridical relations.

The English reader will find ample proof of this in the *Hindu Theatre*, and in Mr. Milman's *Nala*; and it may be confidently asserted, that *in no nation of antiquity were women held in so much esteem as amongst the Hindus.*"

7. *Marriage*, has the following operations upon other juridical relations: 1, the paternal power over the children born of the marriage, which in its turn becómes a self-existing family relation, in which throughout there is contained no new determination for the reciprocal relation of the married persons themselves; 2, protection against violation of the moral dignity and honour of the children, through the institutions of the criminal law; and 3, multifarious determinations, in the law of general property, as with regard to the dowry, and to donations, or settlements, in contemplation of marriage. The most, as well as the most important, of these institutions, are not immediate and necessary consequences of the marriage itself; but consequent voluntary actions, optional, but of which the possibility is determined through the existence of the marriage.

8. *The paternal power*, shows its influence upon person and property in several ways. 1. The child, in the natural state of the family life, participates in the enjoyment of the advantages of the estate; but it is well established, that the juridical power of the father, only restricted in a few cases to a limited extent, may refuse the child these advantages for the present, and withdraw them for the future. 2. Again, the son takes upon himself the personality of the father, and carries it on, beyond his father's life: in order that he may in turn hand it over to his own children, and perpetuate it in them. 3. On the other hand, the custody of the person

and property of the children remains under the paternal power during the years of their minority,—which again is the starting point from which tutelage proceeds, as an artificial substitute.

9. *Consanguinity*, or mere blood-connection, is the most indefinite of the family relations; because it appears in so many different gradations, and at last imperceptibly loses itself. Indeed it is not usually recognised as a proper family *juridical* relation: since people are accustomed to place the character of such a right in bilateral opposite juridical claims; whereas relations, merely as such, with a slight exception, have no rights against each other. However the juridical conditions of its existence are strictly determined. Nor is there wanting for it, an influence upon other juridical relations. This influence shows itself most in *marriage*, the possibility of which is excluded, through certain degrees of relationship. Farther in *property*; and here in two ways. The most important influence is that upon the right of *inheritance*, (in connection with which title, the subject of consanguinity is usually considered). A second less important influence shows itself in the obligation to afford *maintenance*,—to furnish food and clothing, which is never imposed except through certain kinds of relationship; and in this obligation in fact consists the only reciprocity of right which can be admitted as really existing among blood-connections merely as such.

10. *Quasi-domestic relations.*—The above three, marriage, the paternal (or rather the parental) relation,

and consanguinity, are according to Savigny the only *natural* family relations. For, though the laws of particular states may, and at present do in some instances, recognise certain *artificial* extensions of the family, formed after the type of the natural relations; he does not consider such institutions as properly within the sphere of the *jus naturale*, inasmuch as, not springing from a general necessity, they do not rest upon a physical-moral basis.[3] However as those institutions, of which the two principal are tutelage and adoption, both of which occupied a large space in the Roman law, and of which the latter still obtains in full force among the Hindus, have been in all treatises discussed as a constituent part of the so called "law of persons," which includes, among other things, family rights, or "the law of *domestic* persons;" independent of the difficulty of assigning them any other place, it will be at least more convenient to retain them in their usual connection, under the distinguishing denomination of quasi-domestic relations.

11. *Tutelage and Adoption.*—It may be doubted, moreover, whether the above named relations are altogether deficient in a natural element. Gaius, in his *Institutes*, contrasts with the tutelage of minors, an institution natural and to a certain extent necessary in all

3 The foregoing is a condensed abstract,—which I have endeavoured to make as clear in language as the nature of the subject will admit of,—of the exposition given by Reddie (*Science of Law*, 2nd *Ed* pp. 302-338,) of Savigny's profound analysis of this branch of jurisprudence, contained in his latest work, *System*, § 53-56.

countries, the tutelage of women, which he considers founded upon no reasonable basis. The minor evidently requires, for the care of his person and property, a supplementary relation of some sort, who, in the phraseology of the Roman law, may fill up the deficiency of his legal person, and give authority (*auctoritas*, from *augere* to increase,) to his acts. Such a relation the Roman law gave in the Tutor or Guardian, (*tueri* to guard,) who in most cases was also a blood-relation to his Pupil or Ward. A similar natural necessity cannot certainly be claimed for the custom of Adoption ; but it may be just worth noticing in passing that this relationship is exactly the converse of the former : the one giving an artificial father to the orphan child ; the other an artificial son to the childless father.

12. *Origin of Adoption.*—Though certain limited foundations in nature may be sought for the custom of adoption, in the existence of the reciprocal obligation to support between parents and children, as well as in the wide-spread, and so called natural, ambition of families to perpetuate into a distant future, if not their blood, at least their name ; yet such a narrow basis could not with any truth be pronounced capable of supporting an institution to which so much importance has been attached, and which, wherever it has prevailed, may be seen broadly to rest upon the conviction, as deeply-rooted in the breasts of Hindus, as of Greeks and of Romans, that the due celebration of obsequies, and of certain prescribed annual ceremonies, is efficacious, if not indispensable, to

ensure eternal beatitude in a future state of existence; and on the consequent anxiety to leave behind after death, in the absence of a natural son, some artificial substitute, whose duty it may be to see to the due solemnization of such rites, and whose interest may moreover be wound up with the performance of such duty, as being the chief consideration for his inheritance.

II.—OF THE MARRIAGE UNION.

13. *Beau ideal.*—"The desires and affections growing out of the Institution of Marriage," says Dr. WHEWELL, "tend to balance the action of the elementary desires and affections, and to maintain man in a moral and social condition. The elementary desires and affections, which lead to the union of the sexes, are refined and tranquillized by the marriage tie. The mutual confidence, and the identification of habits and interests, between husband and wife, which marriage, in its most complete form, tends to generate, give a new charm and a new value to life. When such a conception of a happy married life is formed, it is universally approved of; and thus the moral sentiments confirm the conjugal affections. Each successive generation of young persons, catching the like sentiments, and susceptible of the like affections, looks with hope and desire to this image of a happy marriage, as an important part of the business and object of life. Thus there is produced a *national* sentiment respecting marriage, which makes the institution still more efficacious in its influence upon the moral and social condition of those among whom it prevails. The children which marriage produces give rise to affections, which still further tend to bind together the community by moral and social links. . . . Then comes the education of the child; in which the parents

have a common care, which further identifies their sympathies and objects. The brothers and sisters of the child, when they come, bring with them new bonds of affection, new sympathies, new common objects. The habits of a family take the place of the wishes of an individual, in determining the habitation, the mode of living, the meals, and the like; and thus these circumstances are determined by influences, more social and more refined than mere bodily desire."[1]

14. *National shortcomings.*—Though the abstract conception of a complete marriage appears always to have been the union of one husband with one wife for life,—or as it is perhaps best defined in the *Institutes* of Justinian, "the binding-together of a man and a woman, that constitutes through life an inseparable intimacy," *(viri et mulieris conjunctio, individuam vitæ consuetudinem constituens)*; the notions entertained regarding the conjugal bond by individual nations, as embodied in their positive laws, have hitherto fallen short, in various degrees, of such a complete and permanent union; and polygamy and concubinage have, both in ancient and in modern times, been tolerated in many states, but more particularly in those of Asia.

15. *Syro-Arabians.*—Although the laws of Moses as we read them definitely permit and regulate polygamy,

[1] The above is from the chapter on *Marriage (Elements of Morality, Book IV. c. 5)* in which, within the narrow limits of 17 pages, is contained a general view of the Rights of Family, and of Succession, Roman and English law.

the custom, as Professor Newman observes, no where existed in the body of the nation; the freedom of the Hebrew women, married and unmarried, being utterly opposed to the polygamic spirit. It must nevertheless, he continues, be remembered, that when the safety of a tribe depended on its population, the law of marriage could hardly be the same, as when the moral influences of that state are chiefly looked to; and when a certain public disgrace is incurred by leaving no representative in one's social position, both of the married parties would often become desirous of a deviation from strict monogamy. Concubines, or wives of lower rank, seem to have been reputable, even during the lifetime of a wife, *when no heirs of a family had arisen.*[2] Dr. Whewell remarks that the description of a good wife in the Book of Proverbs (XXXI), where she is represented as sole mistress of the household, and as the object of an entire trust and respect, is inconsistent with her being one of several wives. The practice of polygamy is supposed by Michaelis (*Law of Moses*, II. 12), to have ceased entirely among the Jews after the return from the Babylonish captivity. Mahomed limited the number of wives to four at a time, to which liberal allowance he subjoined (*Sale's Koran*, c. 70) of slaves, as many concubines as a man can acquire, or his right-hand possess.

16. *Hindus and Parsis.*—" 'Let mutual fidelity continue till death;' this, in few words, says Manu, may

2 *History of the Hebrew Monarchy*, by F. W. Newman, p. 18.

be considered as the supreme law between husband and wife." Polygamy, in the literal sense of many wives, but rarely occurs among Hindus of any class ; and even the taking of a second wife, as remarked by Strange, appears to be sanctioned with considerable reserve : principally where the failure of legitimate male issue, with them the indispensable end of marriage, seems otherwise, upon reasonable grounds, to be apprehended.[3] So in a case decided in the Bombay Sudder in 1817, (2 *Borr. Rep.* 209.) it was ruled that a Parsi might contract a second marriage, if his first wife was old and barren and gave her consent, but not otherwise.

17. *The Greeks*, as a general rule, neither practised, nor approved of, polygamy, which as a custom they always deemed " barbaric."[4] The position of the wife,

3 " Although permitted, polygamy is not encouraged by the ancient law, and from its being sanctioned in particular cases only, as of misconduct, aversion, or barrenness, (Manu, ix. 77, 81), it is evident that it was not without restriction. Even the consent of the first wife seems to have been necessary, (ix, 82)."—*Wilson's Mill.* For the modern practice as to second marriage, and its effects, among the several casts, consult *Steele's Law and Custom of Hindu Casts :* Bombay, 1827. See also further on, under *Divorce ;* and in *Appendix No. I.*

4 That polygamy, and even bigamy, was forbidden among the Athenians is evident from a fragment of Aristotle (*De Nobilit.* apud Athen. I. 13) which records that at one time " in consequence of the fewness of men in the state," (after the disastrous Persian wars,) a legislative decree was passed, " that it should be lawful for any man who pleased to have *even two wives.*" Euripides the dramatist, it would appear, availed himself of this enactment ;

however, varied considerably in the different states. In the *Ionian* cities of Asia Minor and also at Athens, the female sex lived in the greatest retirement and were exclusively engaged in household concerns. The *Æolians*

such being the charitable explanation which Aulus Gellius proposes to account for his unnatural detestation of the sex, "*sive quod natura abhorruit a mulierum coetu, sive quod duas simul uxores habuerat.*" Even Socrates, it is said, could not resist the temptation of trying his luck a second time; and Athenæus has on record the names of the two ladies entertained by the simple-minded philosopher. PLATO proposed a *community of wives* for his ideal *Republic*, from which everything that could interfere with his *beau ideal* of a measured tranquillity of mind, was to be excluded, such as conjugal love, fond and foolish; parentage, avaricious and ambitious for its children; property, the arch-disturber of social life, engendering luxuries and crimes; and even poetry, and all, but martial, music, as enervating the mind, and transcending the limits of that moderation which alone can balance the soul;—In the absence of all which pernicious influences, children were to be *bred* according to philosophical principles, with a due regard to the assortment of temperaments between their parents; apart from whose control they were to be brought up in state-nurseries, and classified, according to their respective physical and mental capacities, for future employment in the service of the state,—at the altar of which merciless *Moloch* was to be sacrificed the family, no less than the individual. Those passionless abstractions of Plato, which appear to have had little or no weight with his countrymen, (see *Aristotle's Politics, Lib. II.* 2), have revived with great enthusiasm, in very recent times, among the followers of Owen and of St. Simon; and have now at last, under the auspices of the fanatical and industrious Mormons, established their unnatural *State*, on a secluded oasis,—equally remote from civilized and savage life,—amid the inhospitable wastes of the great western Sahara.

and the *Dorians*, on the other hand, preserved in some degree the pure Hellenic manners, such as we find them depicted in the epic poetry and mythology,—where females are represented as taking an active share, not only in social domestic life, but also in public amusements; and hence their women all along maintained a distinct individual existence and a high moral character, and shared in the advantages of the general civilization, which not only fostered poetical talents of a high order among them, but, as in the time of the Pythagorean league, even produced a turn for philosophical reflections on human life.[5] Among the Dorians, by whom the equal wife was cherished and respected, a corresponding purity of morals prevailed; the gay wits of Athens, on the contrary, leaving their uneducated consorts shut up in their solitary chambers, gladly sought the more congenial society of the accomplished heteræ with whom their city abounded.

18. The *Roman law*, though approaching closely to the conception of a complete marriage, recognised and regulated an inferior sort of union between the sexes called *concubinatus*, which was a permanent cohabitation between parties to whose marriage there was no legal obstacle. Between the formation of such a connection and the contracting of a legal *consortium*, there seems to have been no difference, except in the intention of the parties. If there was no *affectio maritalis*, the woman

[5] *K O Müller's History of Grecian Literature*, edited by Sir Geo. Cornwall Lewis, chapter xiii And see *Appendix No II.*

was not a wife. None of the incidents of marriage attached to such a union: no dowry was asked for; no settlement was made; and the children were not in the power of the father. The children however might be placed, by legitimation, in the position of the offspring of a legal marriage. The custom of concubinage was quite distinct from that of polygamy; no man being allowed to have two concubines, or a wife and a concubine, at the same time.[6]

19. *Influence of Christianity.*—It is certain, says Grotius, *(Jure B. et P., Lib. II. c. 5)*, that most nations of antiquity indulged in a plurality of women: for Tacitus

6 *Sandars' Institutes of Justinian*, Lib. I. Tit x. Dr. Taylor, though admitting that bigamy was universally condemned (if not a capital offence) all down the Republic, yet seems to doubt whether the usage regarding concubinage had always been so strict, because the earliest [known] laws relating to the subject are as late as the time of Augustus; and he considers it to have been scandalous in the Christian Emperors, Constantine and Justinian, to have regulated, instead of abolishing, such a custom. But surely an enactment which guarded even against the very appearance of bigamy, by ordaining that only single men should form such connections *(quam vir coelebs solam habet*, Nov. 18. 74*)*, was a very near approach to the purest form of monogamy, nearer too, it may be observed, than any modern law on the subject. The comic poet Plautus, who wrote during the Second Punic war, drives the nail through the very heart of polygamy with a home stroke of his sledge-hammer :—

Nam uxor contenta est, quae bona est, uno viro :
Qui minus vĭr una uxore contentus siet ?

The wife with a single mate, if good, is content for life:
Why should not then each man be content with a single wife?

records that the Germans were, in his time, almost the only barbarians, who were content with single wives.[7] "It may be truly said," observes Story, (*Conflict of Laws*, c. vii), "that Christianity, by giving to marriage a more affecting and sublime morality, has conferred upon mankind new blessings; and has elevated woman to the rank and dignity of an equal, instead of being a humble companion or a devoted slave." The universal rule, that no one can have two husbands or wives at the same time, (and consequently that a second marriage, during the continuance of the first, is a mere nullity), is, to use the language of Chancellor Kent, (Lec. XXVI), founded on the precepts of Christianity, and on the laws of our social nature; and is supported by the sense and practice of the civilized nations of Europe;—whereas polygamy may be regarded as exclusively the feature of Asiatic manners, and of half-civilized life; incompatible with civilization, refinement, and domestic felicity; and, as observed by another American Professor, Dr Lieber, in his *Political Ethics* (vol II. p. 9), tending to foster the patriarchal principle, which, when applied to large communities, fetters the people in a stationary despotism.

20. MONTESQUIEU, *Spirit of Laws*, *Book* XVI. considers the question :—" How the laws of domes-

7 "With the exception," however, observes Tacitus, in the passage referred to, "*of a few who, by reason of their nobility, are canvassed for several wives.*" So that the ancient Teuton chiefs, like their relatives among the Asiatic Iranians, were taught to look upon polygamy as a princely burden incident to their high station.

tic slavery have a relation to the nature of the climate." To the early marriages prevalent in hot countries he ascribes the dependence and subjection of women; and to the latter he traces the custom of polygamy,—"it being extremely natural that in these places a man, when no law opposes it, should leave one wife to take another: whereas in temperate climates, where the charms of women are best preserved, where they arrive later at maturity, and have children at a more advanced season of life, the old age of their husbands in some degree follows theirs; and as they have more reason and knowledge at the time of marriage, it must naturally introduce a kind of equality between the two sexes, and in consequence of this, the law of having only one wife." He observes that though, in countries where polygamy is once established, the number of wives is principally determined by the riches of the husband; yet it cannot be said that riches have established polygamy in these states, since poverty has been known to produce the same effect: in illustration of which we may point to the fact, that the custom obtains in India, as well among the very lowest from improvidence, as among the highest from extravagance. After referring to certain calculations, not very generally confirmed by more recent inquiries, regarding the relative proportion of males to females, in Europe and in Asia respectively, he proceeds to remark with regard to polygamy in general, that it is not of the least service to mankind, nor to either of the two sexes, whether it be that which abuses,

or that which is abused. Neither is it of service to the children; for one of its greatest inconveniences is, that the father and mother cannot have the same affection for their offspring: the father cannot love twenty children with the same tenderness, as a mother can love two. Besides, the possession of many wives does not always prevent men entertaining desires for those of others: "it is with lust as with avarice, whose thirst increases by the acquisition of treasures."

21. *Oriental seclusion of women.*—The close confinement of women and their strict separation from men, Montesquieu traces to the custom of polygamy; "domestic order rendering confinement necessary, and bolts and bars proving the best precepts." He considers polygamy to be one of the chief impediments to the establishment of a popular government in Asiatic countries, where domestic slavery and political despotism walk hand in hand with an equal pace. Upon the whole, as it has often been remarked, he perhaps attaches too much importance to the influence of climate, which of itself, even in the absence of polygamy, he considers often renders the seclusion of women necessary; while he dwells upon the happiness of living in a climate which admits of free communication between the sexes, and where that sex which has most charms embellishes society.

22. PALEY, with his usual felicity, compresses in a single sentence almost everything that can be said against polygamy, "which not only violates the constitution of nature, and the apparent design of the Deity; but pro-

duces to the parties themselves, and to the public, the following bad effects:—contests and jealousies amongst the wives of the same husband; distracted affections, or the loss of all affections, in the husband himself; a voluptuousness in the rich, which dissolves the vigour of their intellectual, as well as active, faculties,—producing that indolence and imbecility, both of mind and body, which have long characterised the nations of the East; the abasement of one half of the human species, who, in countries where polygamy obtains, are degraded into mere instruments of physical pleasure to the other half; neglect of children; and the manifold mischiefs which arise from a scarcity of women. . . . To compensate for these evils, polygamy does not offer a single advantage."

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III.—CONTRACT OF MARRIAGE.

23. *Capacity to contract.*—In every contract the capacity of the parties may be said to present a threefold aspect : first, a *physical*,—idiots, lunatics, and in some respects infants,[1] being deemed incapable of contracting; second, a *moral*,—persons acting under the influence of force, of fraud of any sort, and in some cases of mistake, having a right to be relieved from the consequences of a transaction, the essence of which ought to be consent[2];—these two, which may be both called natural, being common to all consensual contracts, and their presence to be recognised, however dimly, in every system of positive law; and lastly a *political* aspect,—where some special enactment, which has its immediate sanction in the policy, or supposed interests of the particular state, which is the locality of the contract, in any way affects the transaction.

1 "The privilege given by law to infants, is given as a *shield*, not as a *sword*, and shall never be turned into an offensive weapon of fraud and injustice"—Ld. Mansfield, *Zouch v. Parsons*, 3, Burr, 1801; as to the application of which dictum to the law of marriage, see sec. 27.

2 These general doctrines will be found applied to the *Nullities of Marriage*, in Book III, of *Bishop's Commentaries on the Law of Marriage and Divorce*, (Boston, 1852),—to which work, it will be seen, that I am largely indebted under the present head, and that of *Divorce*. The commentaries extend over 663 pages; and contain merely the *pure* law of marriage, without any of its operations on *property*, &c.

24. *Marriage-contract.*—The contract of marriage differs from all others in the peculiarity of its origin, and in the importance and duration of its effects. Springing from a natural necessity, it contemplates the harmonious adaptation of two hitherto independent and distinct individuals, whose affections, and whose interests, material as well as moral, it proposes to fuse in a more complete and natural joint-existence.

25. *Infant marriages in India.*—How strange then, with regard to a contract, which of all others strikes its roots deepest into human nature, and depends least, so to speak, in its organization, on the external political atmosphere, that custom should among some races seem to disregard the most essential natural elements of all contracts : as among the Hindus, whose unconsenting infants are yoked-together for life, "like dumb driven cattle." As regards the element of consent, however, the exception to the general law of all contracts is perhaps more apparent than real : for consent is deemed as necessary to a contract of marriage by the Hindu law, as it is by the English, or by the French ; but it is not the future spouses who are considered by it, to be the contracting parties, but their respective parents or guardians,—whose consent to the marriage of a minor was formerly deemed indispensable by the English law also. The Indian practice of the mature and sensible parents consenting *in place of* the innocent infant spouses, is chiefly no doubt the result of the more objectionable custom of early marriages,—the fruitful source of countless anomalies.

26. Among *Mahomedans* also, the bride and bridegroom are not considered to be the parties to the marriage contract; though their consent, if of age, is held indispensable: the contract being signed at the mosque, by the parents of the two families, in presence of three or four friends, who attend as witnesses;—the presence of witnesses,—either two men of years of discretion, of sound understanding, and of the Mahomedan religion, or two women and one man,—being an essential requisite to the validity of the ceremony; for the prophet said, "It is not a marriage, unless there be witnesses."[3]

27. *Age of consent: Roman and English law.*—The rule of the common law, which fixes the age of consent at 14 in males and 12 in females, was derived, through the canon law, from the Roman civil law, where it probably had an application not so entirely suited to more northern latitudes. The effect of both, or either of the parties being under such legal age is thus explained by Stephen:—"If the male be under fourteen, or the girl under twelve, the marriage, though not absolutely void,[4] sup-

[3] See *Abstract of Mahomedan Law*, in Vol. II, Journal of R. As. Soc., by Lieut.-Colonel Vans-Kennedy (Bombay Army).

[4] "A marriage is said to be *void* when it is good for no legal purpose, and its invalidity may be relied upon in any proceeding, in any court, between any parties, either in the life-time, or after the death, of the supposed husband and wife, whether the question of the marriage arise directly or collaterally. A marriage is said to be *voidable* when it can only be inquired into, on a proceeding instituted or prosecuted for the purpose of setting it aside, during the life-time of both the husband and wife. Until set aside, it is

posing it celebrated with due solemnities, is inchoate only and imperfect; and either of them, upon coming to the age of consent, may declare the marriage void, without any divorce: in addition to which it is to be observed, that if the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she; and so it is *vice versâ*, when the wife is of years of discretion, and the husband under; but if at the age of consent they agree to continue together, they need not be married again."[5]

28. *Positive enactments*, affecting the contract of marriage, may have reference, either to its *making*; to its *effects* when made; or to the possibility of its total *dissolution*, or partial relaxation. With regard to the first, the law may declare under what circumstances individuals are incapable of forming the contract,—which incapacities are, again, either physical, or moral, (as above explained), purely political, or mixed. It may also

valid for all civil purposes; when set aside, it is rendered void from the beginning."—*Bishop*, § 46.

5 "What is above stated on the subject of the age for matrimony, is to be understood of the actual marriage-contract, by which the parties become man and wife; for a promise to marry *in futuro*, (which is no marriage, but which, like other contracts, may give a right of action for damages, in case of its violation,) is not valid, unless the party making the promise be of the full age which the law provides for other cases of contract, viz twenty-one And where there are mutual promises to marry between two persons, one of the age of twenty-one, and the other under that age, the first is bound by the contract, so as to be liable to an action if it be broken; but on the side of the minor it is voidable"—*Stephen's Commentaries*, *Book III. c. 2.*

prescribe the *mode* of the contract, or the formalities to be observed therein.

29. *Political prohibitions.*—The law of the state may prohibit marriages, either within a narrow circle of relations, a restriction based upon natural reasons ; or beyond a wide circle, among aliens, which must be viewed as a purely political prevention. A man may be compelled to marry within his own nation, or even within his own tribe: as was the case with the Jews, with many of the Grecian cities, and with the Romans. So Manu lays down that a Hindu should marry within his own cast, which rule, however, is admitted to be an innovation, the only restriction which formerly, 'before the *kali-yug*', prevailed, being that men of the regenerated classes were forbidden to take a *first wife* from among the Shudras.

30. *The prohibited degrees.*—Proximity of relationship, or being within certain degrees of consanguinity or affinity, has, in almost all countries, been considered an obstacle to the union of the parties. The degrees of kindred, between which marriage is forbidden, have been different in different times and places.[6] The Hindu law perhaps carries the prohibition to a greater extent than any other

[6] It is very difficult, observes KENT, to ascertain exactly the point at which the laws of nature have ceased to discountenance the union. It is clearly established that marriages between *lineal relations*, by blood or affinity, in the ascending and descending lines, are unnatural and unlawful, and lead to a confusion of rights and duties. On this point, the civil, the canon and the common law are in perfect harmony. But when we go to *collaterals*, it is not

code: among the regenerate classes a woman to be eligible, says Strange, must not be descended from the paternal or maternal ancestors of her proposed husband within the sixth degree. Prior to the Koran the Arabs appear to have observed a due regard to the impropriety of too near a connection between kindred. Mahomed adopted, though he also extended, the provisions of the Levitical

easy to fix the forbidden degrees by clear and established principles. It was considered in an American case (*Wightman v. Wightman*, 4 Johns. Ch. Rep. 343,) that marriages between *brothers and sisters* in the collateral line, were, equally with those between persons in the lineal line of consanguinity, unlawful and void; as being plainly repugnant to the first principles of society, and the moral sense of the civilized world. It would be difficult to carry the prohibition farther, in the absence of legislative enactment. The *Code Napoleon* has adopted precisely the same extent of prohibition, as forming the impassable line between lawful and incestuous marriages, and though the prohibition goes deeper into the collateral line, yet the government reserved to itself the power to dispense, at its pleasure, with such further prohibitions. It is evident that the compilers of that code considered the marriage between collaterals in the first degree of consanguinity prohibited by a rule, which was of absolute, uniform and universal obligation; because, as to the prohibition between brothers and sisters, the sovereign had no dispensing power. Dr. Taylor, in his *Elements of the Civil Law*, pp. 314—340, 4th Ed, has gone deeply into the Greek and Roman learning, as to the extent to which marriages between relations should be prohibited. He thinks the fourth degree of collateral consanguinity is the proper point to stop at, and that the marriage of cousins-german, or first-cousins, who are in the second degree according to the canon law, is natural as well as lawful, and therefore that the Roman law properly established that degree, being the fourth according to their method of computation, as the first which could match with decency.

law, by which in this respect the English law likewise is chiefly regulated. The Roman civil law agrees to a great extent with the modern law of England on this subject; but the Canon law went much further, prohibiting at one time as far down as the seventh degree, afterwards, (by the 4th Council of Lateran held in 1215,) reduced to the fourth degree, which, according to the canonical method of computation, is that of second-cousins,—the Civil law, as well as the English law since the Reformation, placing no restriction on marriages between first-cousins.[7]

[7] *What are prohibited degrees in England*, the statutes of Hen. VIII. (25, c. 22, and 32, c. 38.) have not enumerated . leaving them to be looked for in the Levitical degrees; but not as interpreted by the Canon law. The following marriages are, according to Stephen, by statute illegal; and by the 5 and 6 W. IV. c. 54, now absolutely *void* to all purposes whatever:—" those between persons in the ascending and descending line *in infinitum* and those between collaterals to the third degree inclusive, according to the computation of the Roman law. The prohibition, however, as to collaterals is held to extend not only to *consanguinei*, or those related by blood, but to *affines*, or those related by marriage. Thus a man can marry neither his sister, nor his wife's sister, for both are related to him in the second degree; nor his sister's daughter, nor wife's sister's daughter, for both are in the third degree; but he may marry his first-cousin, for she is in the fourth degree. Though the *consanguinei* of the wife are always related by affinity to the husband, and the *consanguinei* of the husband to the wife; it is to be remarked, on the other hand, that the *consanguinei* of the husband are not at all necessarily related to the *consanguinei* of the wife. Hence two brothers may marry two sisters; or father and son a mother and daughter. Nor is the husband related to the *affines* of the wife, nor *vice versâ* therefore a man may marry his wife's brother's wife."

31. *Reasons for such prohibitions.*—According to modern opinions, says Bishop, marriages between near relations in consanguinity are a violation, in a certain sense, of the physical laws of nature. They tend to the deterioration of the race: the children which spring from them are feeble in body and mind, subject to disease in the former, and insanity in the latter. Such marriages have always been prohibited; but chiefly from other reasons, as that the toleration of them would impair the quiet and concord of families, jeopardize female chastity, and hinder the formation of favourable alliances. Where the latter class of reasons have been the controlling ones, affinity has been considered to be as great an obstacle to marriage as consanguinity; where the former, it has been regarded as no impediment whatever.

32. *Forms of procedure*, prescribed by the laws of any particular state, are but the drapery of the contract; and where a statute requires the marriage to be attended with specified formalities, in order to its validity, the mutual consent of the parties, which is the essence of the transaction, is no less indispensable. "The forms of law are superadded; but they are not a substitute for the consent: indeed they are but so many different modes of declaring, and substantiating it."

33. *What constitutes consent.*—"The consent which is essential must contemplate a present marriage, in distinction from a mere contract *de futuro*. A marriage may be contracted *per verba de præsenti* merely, or *per verba de futuro, cum copulâ* (Lord Cottenham, in

Stewart v. Menzies, 2 Rob. Appeal Cases, 547). The copula, however, is no part of the marriage; it only serves to a certain extent, as evidence of marriage. It was a maxim of the civil law, and it has become equally so of the ecclesiastical, of the common, and indeed of all law, that *consensus, non concubitus, facit matrimonium*, (Dig. 50. 17. 30). Hence, when two parties, capable of intermarrying, agree to be married in the present time, the marriage is complete; and the consummation, as it is sometimes termed, adds nothing to its validity (*Lindo* v. *Belisario*, 1 Hagg. C. R. 216). This is true every where, subject to the qualification, that in some countries there are statutes requiring the addition of certain ceremonies, and the compliance with certain forms. The rule that, a promise of future marriage is converted by copula into a present consent, being one of evidence merely, may be controlled by proof that a marriage was not intended."[8]

[8] *Bishop's Commentaries*, § 63—67, & 90—98.

IV.—HUSBAND AND WIFE.

34. Position of the Wife: *Roman law.*—Females, by reason of the incapacity supposed to attach to their sex, (*propter animi levitatem,*) were, in strict theory, never *sui juris.* The daughter was under the *patria potestas* before marriage; and by it she passed into the family of her husband, under whose *hand* (*in manum*) she was to be, person and property;—the law treating her as his daughter, to preserve the symmetry of the family system. Moreover, if a girl was left unmarried, and without a testamentary guardian, the law,—which considered women, no matter what their age may be, as incapable of going through solemn forms,—ordained that the nearest *agnatus* should, as *tutor,* give authority to her legal acts (sec. 11); and if she subsequently married, and happened to survive her husband, the tutelage revived;—women being either *alieni juris,* or else under a tutor all their lives.

35. *Subsequent modifications.*—Among the patrician *gentes* marriage was originally formed by a peculiar ceremony termed *confarreatio,* which had the effect of rendering the wife a part of the husband's *mancipium,* or property; whereas among the plebs, who were without the pale of the *jus sacrum,* in lieu of the religious rite, a fictitious sale *co-emptio* obtained, by which also the wife passed from her father under the *manus* of her husband. In case of simple cohabitation the same power was given

by *usus*, or the mere lapse of time, on the analogy of the ownership over *things* which was acquired by uninterrupted possession. Time however improved the position of the wife. It was felt to be a hardship that she should in all cases pass into her husband's power; and the law of the XII *Tables* declared that if the wife absented herself from her husband for three nights in the year, the *usus* should be considered interrupted, and she should continue, by the theory of the law, in her own family;—an arrangement which was considered so much more advantageous to the wife that, even in the latter days of the Republic, almost all marriages were formed without the wife passing *in manum viri*; and in the time of Justinian she never did so;—the whole distinction of the effect of different modes of marriage having before then become long obsolete.[1]

[1] Compare, *Code* v 4. 25.; Sandars' notes to *Institutes*, I. 10; and Gibbon chap. XLIV. The *confarreation*, or participation by the spouses of the same cake of *far*, or rice, the ancient food of Italy, served, says Gibbon, as an emblem of their mystic union of mind and body. There was likewise a preliminary oblation as among the Hindus, (see sec. 41). Of the eight kinds of marriage enumerated in the Hindu Digest, (3 *Colebrooke's Trans.* 604,) the principal are, the religious rite *Brâhm*, at first peculiar to the sacerdotal order, but which at present, says Jagannath, "are the only nuptials practised by good men;" the *Asûr*, so called from a species of demon, being *a sale by the father*, which is denounced as infamous by the Brahminical jurists, (see Appendix No. I, sec. 8.), but which, at one time, was the only form observed among the mercantile and agricultural classes, "and it is questionable," says Strange, "whether any other now obtains in Southern India;" and the *Râkshas*, or *Titanic* rape of a

30. *The law of England*, as administered in the common-law courts, considers the husband and wife, for some purposes, to be one person. As a general rule, a man can neither grant any thing to his wife, nor enter into a covenant with her ; and compacts between them, when single, are mostly avoided by the subsequent marriage. A woman, however, may be agent for her husband, " for that implies no separation from, but is rather a representation of her lord" (1 Bl. Com. ch. xv.) ; and a husband may bequeath any thing to his wife by will, for that cannot take effect till the union is severed by his death (Co. Litt. 612). " With a view to the same principle of the legal identity of husband and wife," says STEPHEN, " and to the identity of interest, which, in the nature of things, must always exist between them ; and in part also to the policy of preventing, as much as possible, all occasions for domestic dissension, or distrust, it is as an ancient rule of our law, that persons standing in this connection, cannot in trials of any sort, whether civil or criminal, be received as witnesses for or against each other ;—the only exceptions being, that in a criminal prosecution against the husband for treason, or for violence to the person of his wife, the evidence of the latter is, in the first case on account of the tie of allegiance,

damsel seized in war,—for whose lot, as observed by Strange, the Mosaic law (Deut. ch. xxi, v. 10, et. seq.) humanely provided, in like manner, by requiring her captor, taken with her beauty, to marry her,—which rude espousals were, according to Yádnyawalkya, permitted, though not approved of, for warriors alone.

in the other on the ground of evident necessity, admitted; that in favour of traders, the wife of a bankrupt is liable to be examined in reference to the husband's estate and dealings; and that to facilitate the recovery of small debts, the wife is allowed as a competent witness for and against her husband."[2]

2 If a husband and wife, says Blackstone, were admitted to give evidence for each other, they would contradict one maxim, *nemo in propria causa testis esse debet;* and if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare.* These, however, have both now lost their force, owing to the recent statutes of 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99: by the former of which the incapacity of persons to be witnesses, on the ground of their being interested in the event of the inquiry, is removed; and by the latter, the parties to the cause are also made competent, and even compellable, to give evidence. It has been decided, nevertheless, that these two statutes taken together have not had the effect of setting aside the rule of law, which disables husband and wife from giving evidence for or against each other; and which, according to Stephen, is sufficiently supported by the additional reason referred to in the text, viz., that which regards the distrust and insecurity which would be introduced into the conjugal relation, if they were allowed so to act. "A rule like this, says BENTHAM, protects, encourages, inculcates fraud. For positive falsehood, is but one modification of fraud; concealment, a sort of negative falsehood, being another: I mean, concealment of any facts, of which, for the protection of their rights, individuals or the public have a right to be informed. . . . By aggregating the act to the class of crimes, and rendering it punishable as such, it [the law] declares it to be a mischievous act, and to such a degree so, as to be a crime. By authorising an individual to conceal it, in a case in which it is not so much as pretended that its mischievousness is in the smallest degree less than in other cases, it at once protects and encourages two different acts,—of the mischievousness and criminality of which it shews itself sufficient-

37. *Coverture.*—While the wife is thus considered for some purposes the same as her husband, she is from other points of view a distinct but subordinate person; "being under his cover, protection, and influence, and therefore called, in our law-French, a *feme-covert.*" This coverture, besides the power which it gives her husband over her *person* and *property*, subjects her to a variety of disabilities as regards her *legal capacity.* She cannot in general contract so as to bind herself or her husband, unless as his agent (sec. 43). Neither can she bring any action at law to obtain redress for injury, unless with her husband's concurrence, and in his name as well as her own;[3] but she may act independent of him

ly sensible on other occasions,—the principal crime, and that concealment of it, which, when the act so concealed is criminal, is itself a crime. It debases and degrades the matrimonial union; converting into a sink of corruption, what ought to be a source of purity. It defiles the marriage contract itself, by tacking to it in secret a license to commit crimes. . . . Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes!—Think? answers the legislator; yes, indeed, I think of it; and, in thinking of it, what I think of besides, is, what *you* ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. . . To the legislators of antiquity, the married state was an object of favour: they regarded it as a *security for good behaviour*; a wife and children being so many pledges. The policy of feudal barbarism, of the ages which gave birth to this immoral rule, is to convert that sacred condition into a *nursery of crime.*"—*Rationale of Evidence*, in 7 Collec. Works, p. 485

3 "But although the wife has no power to sue in her own name, independently of her husband, during the coverture, yet she

when she exercises any mere authority, with which she is invested on behalf of a third person. On the other hand, the coverture entitles her to certain *privileges*:—"First, she cannot be sued in a civil action, without making her husband a joint defendant; and this applies, not only to causes of action arising after marriage, but also to her debts and other liabilities contracted before it: for he is considered as responsible for her, in respect of all demands, having by the marriage adopted her and her circumstances together. Even when sued in *autre droit*, she is entitled to the same *shelter* of being joined with her husband, though her acts in that capacity are free from his control. Second, in regard to criminal law, she is not liable to be prosecuted at all for some felonies committed by her in the presence of her husband, the law supposing her to act in such cases under his coercion; but where she is liable as a criminal, she may be indicted as such without making her husband a joint defendant, contrary to the rule which obtains in civil actions."[4]

is entitled under certain circumstances, when living separate from him, to *maintain an action in his name*, and the courts will prevent him from fraudulently interfering to defeat such action."—2 *Addison on Contracts*, 865.

4 *Stephen's Commentaries*, III. 2. "But this is *only the presumption* of law: so that, if upon evidence it clearly appear that the wife was not drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as he; and if she commit a theft of her own voluntary act, or by the bare command of her [absent] husband, or be guilty of treason, murder, or robbery, (which are *mala in se*,) *even by coercion of her*

38. *Husband's power over* WIFE'S PERSON.—The early codes of all nations, says Strange, seem to have subjected the wife, among other members of a man's family, to corporal chastisement. The Roman law did so to the extent of allowing the husband, for some misdemeanours, *flagellis et fustibus acriter eam verberare* (to beat her severely with whip and stick); for others, *modicam castigationem adhibere* (to administer moderate chastisement). The old English law gave the like permission, restricted only within somewhat more reasonable bounds. Manu also, whether he set, or only followed, the unmanly example, certainly includes the wife among the objects of domestic discipline, when conceived to deserve it; but for the credit of Hindu law, a maxim, of authority deemed to be equivalent to that of Manu, says beautifully, 'Strike not, *even with a blossom*, a wife guilty of a hundred faults': and it may be confidently assumed that, at this day, in no British Court in India would the claim be tolerated for an instant, justifying so much as the lifting up a finger against a woman. "With us, says Blackstone, in the politer reign of Charles the Second, this power of correction began to be doubted (*Lord Leigh's* case, 3 Keb. 433); and a wife may now have security of the peace against her husband, or in return, a husband against his wife. Yet the lower rank of people, who were always fond of the

husband (?), she is punishable as much as if she were sole."—*Russell on Crimes*. I, ch. I, *3rd ed*, which see for further information on this subject.

old common law, still claim and exert their ancient privilege ; and the courts of law will still permit a husband to restrain his wife of her liberty, in case of any gross misbehaviour." And so it was ruled *in re Cochrane*, (8 Dowl. 630) ; "as the husband, says Stephen, has a right to the custody of his wife's person."[5]

5 *Rights of Women*—A future belief that subordination of sex is inequitable, is clearly prophesied by the change civilization is working in men's sentiments. The arbitrary rule of one human being over another, no matter in what form it may appear, is fast getting recognised as essentially rude and brutal. In our day, the man of refined feeling does not like to play the despot over his fellow. He is disgusted, if one in humble circumstances cringes to him. Even paid domestics, to whose services he has obtained a right by contract, he does not like to address in a tone of authority : he seeks rather to disguise his character of master, and wraps up his commands in the shape of requests. A further increase of this same refinement will show men that there is a fatal incongruity between the matrimonial servitude which our law recognises, and the relationship that ought to exist between husband and wife. Command is a blight to the affections : whatsoever of refinement, of beauty, of poetry there is in the passion that unites the sexes, withers up and dies in the cold atmosphere of authority. There are, without doubt, many who will rebel against this doctrine ; many who hold that the obedience of one human being to another is proper and virtuous, and who think the subjection of the weaker sex to the stronger legitimate and beneficial. Let them not be deceived : a nation's institutions and beliefs are determined by its character ; men's perceptions are warped by their passions ; and as many customs deemed right by our ancestors, appear detestable to us, so, many customs which we think proper, our more civilized descendants may regard with aversion : even as we loathe those barbarian manners which forbid a woman to sit at table with her

39. WIFE'S PROPERTY: *Roman law.*—When the wife passed *in manum*, says Sandars, all that she had belonged to her husband; when she did not, all her property belonged exclusively to herself, and all gifts between husband and wife were strictly prohibited by law. But as a provision for the expenses of marriage, the wife contributed the *dos*, which, given before marriage, and sometimes increased after, at one time, belonged absolutely to the husband, whose rights over it were by the old law unrestricted. Gradually, however, limitations were introduced; and a law was passed by Augustus, (*de fundo dotali,*) which imposed upon the husband the obligation of restoring, at the end of the marriage, all immoveables comprised in the *dos*, a provision which, in the time of Justinian, was extended so as to include the value of moveables also. The *donatio-ante-nuptias*, of which we first hear in a constitution of Theodosius and Valentinian (C. v. 17. 8. 4), which speaks of it as recog-

lord and master, so may mankind one day loathe that subserviency of wife to husband, which existing laws enjoin. Of all the causes which conspire to produce the disappointment of those of glowing hopes with which married life is usually entered upon, none is so potent as this supremacy of sex, this degradation of what should be a free and equal relationship, into one of ruler and subject. Only as that condition of slavery to which women are condemned amongst barbarous nations is ameliorated, does ideal love become possible; and only when that condition of slavery shall have been wholly abolished, will ideal love attain fulness and permanence.—*Condensed from chap.* 16 *of Spencer's Social Statics.*

nised by law, was a gift on the part of the husband as an equivalent to the *dos*. It was the property of the wife, but managed by the husband, and could not be alienated even with her consent.[6]

40. *English law.*—According to the doctrines of the common law, the personalty of the wife in general vests absolutely in her husband, who also takes a joint interest in her real estate, so that she can have no separate property; but in contemplation of equity, she has an inde-

6 Sandars' notes to *Institutes*, II. 7 & 8., and IV. 6. *Dos*, [dotarium, douarium,] *douaire*, dower, from Gr. δοτον = Lat. *donum*, originally the wife's *gift*, or fortune,—which is still its popular meaning in English, as when we say 'a dower-less maiden',—came in time to signify the provision to which marriage entitled her out of her husband's estate. Technically in English law *dower* is, "that estate which, upon the death of the husband, the law gives to the wife surviving in all estates of inheritance, of which the husband was solely seized during the coverture, and to which any issue she might have had, might, by any possibility, have been heir,"—the object of the estate so given being the support of the widow, and the nurture and education of the husband's younger children. (Co. Litt, 30. b.) A very full treatment of the *Law of Dower*, including the alterations introduced therein by the 3 & 4 W. 4, c. 105, [extended to India, "in cases governed by the English law," by Act xxix. of 1839,] will be found in Book vi. of Bell's *Law of Property, as relating to Husband and Wife*, (1 *vol.* 8*vo.*, *price* 10*s.*);—books iii. and iv. of the same work containing a general view regarding the *nature* of such property, and v. vii. and viii. regarding *succession* thereto; and Part II. treating of *settlements* by the husband,—ante-nuptial and post-nuptial, and of the wife's *separate estate*. The whole subject is more fully discussed in *Bright's Law of Husband and Wife*, 2 vols. 8vo.

pendent estate in whatever is secured to her through the medium of a trustee, provided the intention of the grantor be distinctly declared, that she should have to her sole and separate use. "As it is a rule in equity that a trust shall never fail for want of a trustee, it follows that, where the intention to give the wife an independent interest is clear, she will be held to take a separate property; even though the donor should have omitted to name any trustee, and the estate consequently vests at common law in the husband: for, to effectuate such intended trust, the court will, if necessary, consider the husband himself as her trustee. Where the wife becomes entitled during the coverture to any equitable property *not* settled to her separate use, the courts of equity follow the principle of the common law, and allow the husband to claim it as his own; but even in that case, they will not assist his claim, except upon condition of his making an adequate provision for her out of the fund, unless she already enjoys a competent settlement, or freely consents to its being paid over to him without condition. It is also to be observed, that in respect of any trust property settled to the separate use of the wife, equity will allow her to sue her husband, or be sued by him: unlike the common law, which as above stated considers husband and wife incapable of standing towards each other in the relation of plaintiff and defendant. The rule of the ecclesiastical courts, in matters falling within their jurisdiction, is the same in this respect with the rule in equity: that is, they permit husband

and wife to be opposed to each other as parties in a suit."

41. *Hindu law.*—The following enumeration, slightly modified from that by Strange, (extracted principally from the *Smriti-chandrik,)* comprehends nearly all the instances of *wife's property* (*stri-dhan*), that occur elsewhere, and more than are universally admitted :—1. What is given to a young woman, or to her husband in trust for her, at the time of her marriage,—that is, during the space from the beginning to the close of the nuptial ceremony, commencing with the oblation for prosperity ; but not to be confined rigorously to the day, if given on account of the marriage, (3 Dig. 610). 2. Her *fee*, or what is given to her in the bridal procession, upon the final ceremony, when the marriage, already contracted and solemnized, is about to be consummated, the bride having hitherto remained with her mother; the present in question being said to be intended as a bribe, 'to induce her to repair the more cheerfully to the mansion of her lord.' 3. What is given to her on her arrival at her husband's house. 4. Subsequent gifts, by her parents or brothers ; as well as any thing given her at any time by any of her relations, being specially given,—a description sufficiently general to comprehend gifts so made to her before marriage, which are expressly included by various authorities, (*Mitákshará*, ch. II. xi, 5). 5. The gratuity given by her husband, proposing to take another wife, to reconcile her to the superses-

sion. 6. What a woman receives from the bridegroom at the marriage of her daughter. 7. What she owes at any time to the good graces of her husband, as for instance, a reward for performing well the business of the house in her department, called *sûlk*, her perquisite (*Kátyáyan*. 3. Dig. 563). 8. What is given to her for sending her husband to perform some particular work. 9. The earnings of her industry, as by sewing, spinning, painting, and the like. And, 10. Property, which a woman may have acquired by finding, or purchase, as well as, according to *Vidnyáneswar*, whose authority is great in Maharáshtra and in the South, whatever devolves on her by inheritance,—which however is otherwise considered by the jurists of the Eastern School.[7]

42. *Mahomedan law.*—The legal consequences resulting from marriage, says Vans Kennedy, are not distinctly laid down. It would seem however, that in theory the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries ; but in practice, custom has placed the

7 The instances 8 and 9 do not occur in the enumeration given in the *Mitakshara*, any more than in *Manu;* and some texts exclude them (*Kátyáyan*, 3, *Dig.* 566 ; *Nárad*, 2, *Dig.* 249.) ; but Jagannáth, the compiler of the DIGEST, declares for those authorities who retain them ; observing that no argument can be found to show why a woman should not have independent power over that which she has gained by her skill in the arts, or which has been given to her by a stranger through friendship, or for a good and religious consideration. See, however, *Steele*, I. 72, & 76 ; and *Vyawahár Mayúkh*, ch iv, 10, Borradaile's Trans.

wife entirely under the power of the husband, and should she at any time enjoy any separate rights, it must be with his consent. The husband, however, is bound by law to furnish his wife with a place of residence, clothes and food; both during the time that she lives with him as his wife, and during the prescribed period after a divorce; but if she elopes from him, he is not obliged to furnish her with necessaries.

43. WIFE'S CONTRACTS : *Husband's liability.*—"Whenever, says Smith, a wife's contract, made during marriage, binds the husband, it is on the ground that she entered into it as his agent. Now that she may be appointed his agent in the same way that any other individual may, either by express words, or by implication, I have already mentioned. I am not however, now speaking of that sort of agency which is purely conventional, and in no way depends on the relation of husband to wife, but of another and a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife." *(Law of Contracts*, x.) "The whole of this branch of the law may be shortly summed up thus: —while a wife continues to live with her husband, the presumption is that she has authority to bind him by contracting for necessaries; but that presumption is subject to be rebutted. When she is living separately from him, the presumption is that she has no such authority; but that presumption also is subject to be rebutted, by shewing that the separation was by consent or occasioned by the husband's misconduct:

in which cases, if he leave her without adequate funds for her support, she has a right to pledge his credit by contracting for necessaries."[8]

44. *How recognised by law.*—" It is difficult at the first sight," says Addison, " to see how any credit can be recognised by the law as having been given to a married woman, who can incur no liability *ex contractu*, and who is, theoretically, under the absolute control and government of the husband ; but as in modern times, marriage settlements have been brought extensively into use, and married women are permitted, through the medium of trustees holding property for their use, to have possession of pocket-money, pin-money, and quarterly allowances, it is left to juries to say, whether the things furnished to a wife were not furnished to her on the credit of her funds of which she was, actually or presumptively, possessed, and whether the tradesman did not deal with her on her own account, upon the expectation that she would be the paymaster, relying upon her honor and good faith to apply, whatever separate means she might have at her disposal, in liquidation of her debts."

[8] *What are necessary things for a wife*, is a question which, as well as the analogous one of, what are necessary things for an infant, has often been the occasion of doubt and litigation In *Peters v Fleming* (6 M. and W. 42), ALDERSON, B. in the course of the argument says : " the term ' necessaries,' as applied to dress, may mean those things without which the party would lose caste in society ;" and he lays down the true test as being, " whether the articles were obtained for real use, being also suitable to the condition and degree of an infant "

45. *French law of nuptial-partnership.*—It may be well, before concluding, to present by way of contrast to the English law on the subject, which is admitted upon all hands to be anything but a model of perfection, the law which was established in France by the *Code Napoléon;* and of which Judge Story, in his *Conflict of Laws*, c. 6, furnishes a convenient outline :—" The Code does not undertake to regulate the conjugal association as to property, except in the absence of a special contract, which the husband and wife may, under certain limitations, make as they shall judge proper. When no special stipulations exist, the case is governed by what is denominated the rule of community, *le régime de la communauté.* This community or nuptial partnership, generally extends to all the moveable property of the husband and wife, and the fruits, income and revenues thereof, whether in possession, or in action, at the time of the marriage, or subsequently acquired; to all immoveable property acquired during the marriage; but not to such immoveable property, as either possessed at the time of the marriage, or which came to them afterwards by title of succession, or by gift. The property thus acquired is liable to the debts of the parties existing at the time of the marriage ; to the debts contracted by the husband during the community, or by the wife with the consent of the husband ; and to the maintenance of the family, and other charges of the marriage. As in common cases of partnership, recompense may be had for charges which ought to be borne exclusively by either

party. The husband alone is entitled to administer the property of the community; and may sell, alien and mortgage it, without the concurrence of his wife. He cannot dispose *inter vivos* by gratuitous title, of the immoveables of the community or of the moveables, except under particular circumstances; and testamentary dispositions made by him cannot exceed his share in the community. The community is dissolved by natural death, by civil death, by divorce, by separation of body, or by separation of property. Upon separation, the wife resumes her free administration of her moveable property, and may alien it. But she cannot alien her immoveable property without the consent of her husband, or without being authorized by law upon his refusal. Upon the death of either party, the community being dissolved, the property belongs, equally, to the surviving party, and to the heirs of the deceased, after the due adjustment of all debts, charges, and claims on the fund, in equal moieties. Such is a very brief outline of some of the more important particulars of the French code, in regard to the property of married persons, in cases of community. They may vary these rights by special contract; but it would carry us too far to enter upon the consideration of such peculiarities, as our object is only to point out the more broad distinctions between the English and French law, which, it will be seen, present, upon the most superficial examination, very striking differences; . . . . . and these differences, which are by no means all which exist, exemplified in the French and

English laws, are for the most part the very same, as exist in America, between the states settled under the common-law, and those settled under the civil-law; between those deriving their origin from Spain or France, and those deriving their origin from England."

V.—DISSOLUTION OF MARRIAGE.

46. *Resumé.*—Having thus considered the nature and character of the marriage-union, and the ideas entertained regarding it,—by the Semetic and Iranian races in the East, by the Greeks and Romans in ancient Europe, and by modern Christendom; having given a general and comparative view of the essence and accidents of the marriage-contract; and having briefly reviewed the law of husband and wife, Hindu, Roman, and English,—contrasting with the last the modern law of France on the same subject; it still remains to consider whether, if ever, and if so, under what circumstances, the marriage-tie can be either totally dissolved, or partially relaxed, during the lifetime of both spouses, so as not only to alter the relative position of the parties themselves, but also so as to affect their dealings with strangers.

47. *Civil death of the husband.*—"If the husband has been banished by act of parliament, or has been transported beyond the seas for the term of his natural life, he is civilly dead; and the wife is forthwith remitted to the situation and position of a *feme sole.* If a husband has separated himself from his wife, and has not been heard of for the space of seven years, he is presumed to be actually dead. 'The presumption of the duration of life with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living.'

(Ellenborough, C. J., 6 East, 85). If, therefore, it be shown that the wife has been living apart from the husband for a space of time exceeding seven years, that the latter has not during all that period been heard of, this is *primâ facie* evidence of his death, and the wife may be sued as a widow. (*Wilmot's* case, Moore 851)."[1]

48. DIVORCE.—There is no question, says the American commentator, upon which a greater diversity of sentiment has prevailed in different ages, and among different nations and individuals of civilized men, nor upon which there is at present a greater division of opinion, than whether, and for what causes, a marriage originally valid, may properly be dissolved. The two extremes of opinion are, that which regards marriage as a mere temporary partnership, which either party may abandon at pleasure; and that which holds it indissoluble for any cause, by any earthly power.

49. *The Roman law*, deeming consent to be the

1 *Addison on Contracts*, 885. The application of the *Law of Contracts* to *Marriage*, and to the liabilities resulting therefrom, will be found ably reviewed in Mr. Addison's valuable work (vol. ii. pp. 841—892, 3rd ed.) The most scientific method of treating the subject, perhaps, would be to consider, 1st, how far the abstract right of women, as free human agents, to enter into Obligations *ex-contractu* is, or ought to be, modified by the disabilities which the positive laws of particular states have imposed *upon them only*, as a consequence of the marriage-union; and 2ndly, how far the husband and how far the wife, are, or ought to be, in particular cases liable, as to person or property, in respect of contracts made by either, prior to, during, or after the termination of the marriage.

essence of marriage, placed no obstacle in the way of divorce when either party wished for it. Gibbon supposes it to have been originally the 'manly prerogative.' The right, however, was considerably restricted under the Christian emperors ; and unless both parties consented to a divorce, heavy penalties were attached to its being insisted on by one alone, unless any of the grounds of divorce established by law, such as adultery or criminal conduct (Code V. 17. 8), could be shown to exist. After the divorce either party might marry again.

50. *Hindu law.*—It would seem, says Strange, as if the right of divorce was in general by the Hindu law marital only ; not competent to the wife, unless by custom in contradistinction to the Shastra. The exception may be regarded as proving the rule ; there being castes of the lowest kind indeed, in which not only is divorce attainable on either side, but where having taken place the woman may marry again,—which it has been seen she cannot in general do.

51. *Doctrine of supersession.*—"It remains," he continues, "to consider the doctrine of supersession, by virtue of which, though the woman can marry but once, to the man a plurality of wives at the same time is competent, though not at his mere pleasure ; the attempt, which is *justifiable* in some instances, in others only *admissible*, being, where it can neither be justified nor tolerated. *illegal.* 1. The grounds that justify it, regarding the conduct, the temper, or the health of the wife ; to which may be added, barrenness, or, during a period of ten years, the

production only of daughters. In any of these cases, cheerful acquiescence on her part entitles her to be treated with proportionable liberality ; while contumacious resistance subjects her to coercion, to public exposure, nay even to the discipline of the rope (Manu, ch. IX. 83). 2. Upon the principle of *volenti non fit injuria*, the first wife's assent supplies the want of a justifiable cause ; as may be collected from various passages, indicating the means of obtaining it, and reconciling her to the intended purpose, by a suitable settlement. 3. Illegal supersession is the abandoning, with a view to another, a blameless and efficient wife, who has given neither cause nor assent ; a conduct for which the husband, says Nárad (2 Dig. 413), shall be brought to his senses by the king, 'with a severe chastisement.'[2] A wife superseded, under whatever circumstances, must be provided for (2 Dig. 412) ; a benefit that is construed by the pandits as rendering it imperative upon her to continue to reside in the house with her husband, his fickleness not absolving her from her nuptial obligation. And, under whatever circumstances she lives apart from him, it is her duty to seek protection from his relations, and, failing them, from her own. 'But, after all,' says Daksh (2 Dig. 411), 'with sorrow does he eat who has two contentious wives.' "[3]

2 "Which is,' says the commentator, "*the punishment of a thief* : for on the subject of the punishment of robbery, VISHNU (the jurist) says, 'The man who deserts a faultless wife, shall suffer the same punishment.' "

3 For, "dissension mutual enmity, and grief, distract his

52. *Mahomedan Law.*—Among the Mahomedans, divorce is as easily procured by the husband, as it was among the Romans. The wife also may, with her husband's consent, purchase her release from the bonds of marriage. This facility, in the opinion of Sir W. Macnaghten, produces small inconvenience in practice :—" Where conscientious and honorable feelings are insufficient to restrain a man from putting away his wife without cause, the temporal impediments are by no means trifling. Dower[4] is demandable on divorce, and, with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than the husband can pay. . . . To be irreversible, moreover, divorce must be repeated three

mind."—This reads like a translation of the epithets applied by the Chorus in the *Andromakhé* of Euripedes (vers 466, *et seq.)* : "discord of houses, ill-will, and sorrow," or as in the Latin imitation, *duplices toros odii et dirae semina rixae.* And see references in *note* to sec. 16, above.

4 " *The mode by which a wife is endowed*, according to the Mahomedan law, partakes partly of the nature of a *jointure*, and partly of common *dower* in England. Where the estate which she is to take is specified, at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once without any formal process ; but where no particular estate, or amount in money, may have been specified, she is entitled to her *muhr-misl* or proportionate dower, which, it must be admitted is but ill-defined,—being so much as it may be found to have been usual, on an average estimate, to endow other females of the same family with."—*Principles and Precedents of Mahomedan Law*, by Sir Wm. H. Macnaghten, Prelim. Rem p xxvi. ; and ch. vii.

times; and between each time a period of at least one month must have intervened."

53. *English law.*—Two kinds of divorce are obtainable in England, the one total, or *absolute, a vinculo matrimonii,* (from the bonds of marriage); the other partial, or *qualified, a mensâ et thoro,* (from bed and board). To obtain the first by sentence of an ecclesiastical court, canonical causes of impediment must have existed before the marriage: canonical disabilities,—which are now reduced to two, namely, corporal imbecility (or inability at the time of the marriage to procreate children,) and proximity of relationship, (lately by 5 & 6. Will. IV. c. 54, made a civil disability also,) rendering the marriage voidable only, and not *ipso facto* void; whereas civil disabilities, with the exception of that for want of age, make the contract absolutely void and not merely voidable.

54. *Divorce Bill.*—"Though absolute divorce cannot [now] be obtained in the regular course of law on the ground of adultery, yet it is frequently granted on that ground by a private act of parliament;—it having become the practice of the legislature to exercise its authority in this matter by way of extraordinary relief to the injured party. . . . In passing such bills, some provision is usually made for the wife out of the husband's estate."

55. *Divorce, a mensâ et thoro,* is allowed where the marriage was originally lawful, but for some supervenient cause it becomes improper or impossible for the parties

to live together, as in the case of intolerable cruelty in the husband, or adultery in either. In such cases, the wife is entitled to *alimony*, or allowance for her support out of the husband's estate,—the amount of which is settled by the judge according to the circumstances of the case, and usually proportioned to the rank of the parties. But the law allows no alimony to the wife, in case the divorce was obtained for adultery on her part, nor in case of her having, from other sources, a sufficient income.

56. "A lawgiver, says PALEY, whose counsels are directed by views of general utility, and obstructed by no local impediment, would make the marriage-contract indissoluble during the lives of the parties, for the sake of the following advantages:—1. Because this tends to preserve peace and concord between married persons, by perpetuating their common interest, and by inducing a necessity of mutual compliance. . . . No lessons of duty, no delicacy of sentiment, will go half so far with the generality of mankind and womankind as this one intelligible reflection, that they must each make the best of their bargain; and that, seeing they must either both be miserable, or both share in the same happiness, neither can find their own comfort, but in promoting the pleasure of the other. 2. Because new objects of desire would be continually sought for, if men could, at will, be released from their subsisting engagements. Constituted as mankind are, and injured as the repudiated wife generally must be, it is necessary to add a stability to the condition of married women, more secure

than the continuance of their husband's affection, and to supply to both sides, by a sense of duty and of obligation, what satiety has impaired of passion or of personal attachment." Divorces are here considered as depending upon the will of the husband: but the same objections apply, in a great degree, to divorces by mutual consent.

57. "*Exceptions in favor of the injured party*,—are admitted by the law of nature, in cases of adultery, of obstinate desertion, of attempts upon life, of outrageous cruelty, of incurable madness, and perhaps of personal imbecility; which by no means indulges the same privilege to mere dislike, to opposition of humours and inclinations, to contrariety of taste and temper, to complaints of coldness, neglect, severity, peevishness, or jealousy: to allow implicit credit to them, and to dissolve marriages, whenever either party thought fit to pretend them, would lead in its effects to all the licentiousness of arbitrary divorces."[5]

58. *The legislative question*, says BISHOP, is one purely of social and political expediency and propriety. Matrimony is a natural right, which can only be forfeited by some wrongful act. It would appear, therefore, to be incumbent upon the government to permit every person of mature years to be the husband or wife of another, who will perform substantially the duties enjoined by the marital relation; and when the relation is in good faith entered into, and one of the parties, with-

[5] *Moral and Political Philosophy*, III. 7

out the fault of the other, so far fails to perform those duties as practically to frustrate the ends of the marriage, it would appear, upon principle, to be the duty of the government to provide some means whereby the failure, being judicially established, and appearing to be permanent, the innocent party should be freed from the matrimonial tie, and left at liberty to form another alliance. The guilty party, in such a case, would have no claim to be protected in a second marriage; and, whether or not he should be permitted to marry, is a question not of right with him, but of public expediency, upon which there is a considerable diversity of opinion. Correlatively with the foregoing proposition, it may be further suggested that every state has an interest, both in the morality and the legitimate increase of its subjects. Public policy, therefore, would concur with private right, in demanding the dissolution of marriages, which had failed to accomplish, substantially, the ends for which they were contracted. By their dissolution, the state would have the benefit of the fruits of such new alliances, as the parties might choose to enter into; and would see the children trained under those better influences, which harmony and matrimonial concord in the parents produce. For the children born during a discordant cohabitation are likely to have their natures originally tainted by it; and especially is it almost certain that their *education*, in which, also, the state has the highest interest, will not be of a salutary character.

59. "The true principle," he continues, "seems to be, that any conduct which renders cohabitation impracticable, and on that ground justifies a separation, should be made sufficient cause to dissolve the marriage. This would leave no scope for divorces from bed and board;—that demoralizing mock-remedy for matrimonial ills, which, in the language of Lord STOWELL, (in *Evans v. Evans*,) casts out the parties, 'in the undefined and dangerous characters of a wife without a husband, and a husband without a wife.' . . . . That legislation which does most to promote actual matrimony, does also most benefit to the morals of the community: for nothing is more true than that, '*honest liberty is the greatest foe to dishonest license.*' If parties are married in law, but not in fact, and therefore are forbidden to enter into connections which are real marriages, they will be liable, unless they are better—not worse—than the average of the community, to commit breaches of the rules of morality, either by promiscuous sexual indulgence, or by forming alliances in the similitude of matrimonial, from which a spurious issue may spring. Indeed, it is well known that, in England, where divorces from the bond of matrimony are only obtainable on application to parliament, in rare instances, and at an enormous expense,—rendering them a luxury quite beyond the reach of the mass of the people (see 35. Law Mag. 73),—second marriages without divorce, and adulteries and the birth of illegitimate children are of everyday occurrence, and the crime of polygamy

is winked at, though it is a felony upon the statute-book.[6]

[6] Formerly in England *adultery* was held to be cause for divorce *a vinculo*, without 'divorce bill,'—as it was by the civil law, where (Code V 17, 8) with reason it is named as the first and chief cause, as it is also in the *code civil* of Napoleon (art. 229—230); but the law was otherwise settled in *Foljamb's* case, 44 Eliz. in the Star-chamber. The strict canonical dogma of the absolute indissolubility of marriage, on the ground of its being a sacrament, was, perhaps, the only tenable position of defence that could be occupied *a priori* against the conflicting license of the civil law. It should also be borne in mind that the ecclesiastical sentence *a vinculo* is not strictly speaking one of *dissolution*, but of *nullity* it does not pretend to dissolve an existing civil contract, but judicially declares such canonical impediment subsisting at the time of the supposed engagement, as rendered it *ab initio* void;—and, therefore, allows of the parties being separated *pro salute animarum* (for the safety of their souls). The decree *a mensâ*, on the other hand,—which originally was probably the result of a compromise between the canonists and the civilians,—is always by the canon law pronounced *sub spe reconciliationis*, that is, with a hope that the spouses may become ultimately reconciled, so as to apply to be discharged from the sentence of separation. "The ecclesiastical law of England," says Burn, "is composed of these four main ingredients: the *civil* law, the *canon* law, the *common* law, and the *statute* law. . . . So that, from any one or more of these without all of them together, or from all of these together without attending to their comparative obligation, it is not possible to exhibit any distinct prospect of the English ecclesiastical constitution." And when to the difficulty of ascertaining what the law upon any point really is, is superadded the very delicate question of its particular application to the family transactions of non-christian Asiatic races, our Oriental fellow-subjects ought perhaps to feel disposed to be anything but obliged to our late Chief Justice, Sir Erskine Perry, whose learned analysis

60. " *What are the specific causes*, for which divorces ought to be granted : may be a question, to some extent, of difficulty. Clearly, *adultery*, *desertion* which practically breaks up the relation, . . . extreme *cruelty* which renders the cohabitation physically unsafe, perpetual, and perhaps temporary, imprisonment for *crime*, habitual and beastly confirmed *drunkenness*, are completely destructive of the ends of marriage ; and they should therefore be, severally, causes of divorce from the bond of matrimony. Beyond this line, we come upon ground more shadowy and doubtful. There are smothered hatred, and love turned to the reverse, and other purely mental causes, which render the marriage burdensome to the parties, and destroy all its higher and holier ends. But these are of so subtle a nature that human tribunals cannot, with any certainty of promoting justice, deal with them ; and the judgment of the present age has been pronounced against allowing parties to divorce themselves at pleasure, since *the community and the children, have an interest in every marriage*, as well as the parties. . . . Modern legislators will, at least, demand, that, before the granting of any divorce, some inquiry be instituted to determine whether the interests of [other] individuals will be prejudiced, if the parties

of the Bombay Charters led him to the conclusion, (in *Ferozbai v. Ardeshir Khurshedji*, *Oriental Cases*, p. 57.) that the Supreme Court has *ecclesiastical jurisdiction over Parsis and other natives domiciled in the Island*, in matters respecting, and in disputes arising out of, their matrimonial contracts

[to the marriage-contract] dissolve a union, *which the highest policy requires, as a general rule, should be perpetual.*"[7]

[7] *Bishop's Commentaries*, § 277—287 Book iv treats of the *general principles* of Divorce, from a chapter in which, on the *policy* of the laws relating thereto, the paragraphs in the text are condensed ; v. of *specific causes*, such as adultery, desertion, cruelty, &c. ; vi of the *consequences* of divorce, including a full treatment of *alimony ;* and vii of the *forum for divorce* ;—books i iii, as before stated (note 2, sec 23) treating of the pure law of *marriage*. The price of the Commentaries is 25*s*.

VI.—FILIATION AND PARENTAGE.

61. *How the character of child*, in relation to determinate persons as parents, is acquired in law,—what modes of establishing such relationship are recognised,—and in what cases, and under what limitations, its *primâ facie* existence is allowed to be disputed,—are evidently questions lying at the very threshhold of that compartment of the law of family which contains the rights and duties of parents and of children, *inter se*, as well as *adversus omnes* (sec. 5). Indeed *filiation* would seem to be connected with the law of parents and children, in exactly the same way that marriage is with the law of husband and wife; being in fact the mode in which the relation originates, which is of course precedent in consideration to the conditions of its existence (sec. 6). In the same manner, under the title of *Emancipation* might, perhaps, be conveniently considered the grounds of relaxation which are, or ought to be, recognised by law to exist with regard to the natural ties which, as a general rule, unite parents and children within the same family;—such as desertion, or excessive bad treatment, on the part of the parents; criminal conduct, involving public disgrace, or loss of citizenship, on either side; and marriage, or separate establishment in life, on the side of the children. But the whole of this branch of the law with regard to the relations of parents and children,—and indeed the laws regarding husband and wife also,—are

scientifically, as well as practically, in a most unsatisfactory condition, not merely in half-civilized countries, as in India where they would seem to be much the same as they were in the days of Manu; but also, in England, and throughout Christendom generally;—bearing still the evident traces of their long subjection to the wonderful dominion of Rome[1]; and requiring everywhere to be thoroughly reconsidered and adapted to the exigencies of modern society.

62. The *Code Civil of Napoléon*,—which in the organisation of the family, and in the relations which flow from it and which the legislator has sanctioned, does not, it is frankly admitted by its critics, exhibit any of

[1] Perhaps the most striking instance, in mere matter of classification, is the unmeaning adherence to the ancient method of considering the law of domestic servants in connection with the family, of which under the Roman system they, as *slaves*, formed a part, as did also the family physicians, and rhetoricians; all being purchasable commodities, long after the time of Justinian,—and subject, upon the death of their master, to distribution among his heirs, according to their respective market values (see Gibbon, note 100, chap. XLIV.). Even Sergeant Stephen, while departing so far from the arrangement of Blackstone, as to give a separate treatment to the "Rights in Private Relations", is still so far hampered by the old system, as to place in the van of his new-made Bk. III. "*of master and servant*,"—a relation which Blackstone himself admits to be 'founded in convenience', not in nature; and which evidently, at least in countries where slavery is not tolerated, belongs as much to the "Law of Contracts,"—under the title of *hiring and service*,—as the law of principal and agent, of landlord and tenant, or of any other merely conventional relation between individuals otherwise unconnected than as members of a common national, or international, society,

those obscurities, defects or anomalies, the result generally of a rough and too rapid transition, which experience has caused to be discovered in what has been called 'the *material part* of the code,' that which treats of effects, or estate, independently of the condition of persons, of the modifications of property, and of the modes in which it is acquired, transferred, warranted or transmitted,—departs considerably in this respect from the method of the Roman civil law which it generally follows. The corner-stone of the Roman law of family was the *patria potestas* (sec. 77), on which as basis all the other titles were constructed.[2] Even *marriage*, the parent as it were of the other institutions of family, was, in contemplation of the law, chiefly viewed as one of the *modes* by which the all-subjecting '*patria majestas*' was acquired;—the other two being *legitimation* and *adoption*. The French code bestows upon each title a distinct and substantive treatment; and may, in regard to many,

2 *The 'master of the family'*, according to Aristotle, rules his slaves, as *despot*, or absolute owner,—Lat. *dominus*, (master of the *domus*, or things and persons *tamed*) whence *dominion*; his children, as *king*, or constitutional sovereign; and his wife, as being the *strongest* of the two, *αριστος* (from *αρης* the war-god), she 'the *weaker* sex.' The two last were subjected by the Roman law to the father's *potestas*, or power *allowed* by the state,—as contrasted with *potentia*, power *acquired* by an individual for himself; and further the *magistrate*, who represented the majesty, or *superior* power of the law, (of which he, individually, was but the *minister*, or *inferior* agent,) was said,—in contradistinction to *dominium* and *potestas*,—to exercise *imperium*, or supreme authority.

be with advantage presented as a model of the method in which concise formulae are made the abstract expression of juristic ideas.

63. *Paternity of husband.*—"A child conceived during marriage has the husband for its parent. Nevertheless, he may disown the child, if he proves that, during the time which elapsed from the 300th to the 180th day before the birth, he was, either by reason of distance, or in consequence of any accident, under the physical impossibility of cohabiting with his wife. . . . He cannot disown the child for cause of adultery, unless the birth has been concealed from him, in which case he shall be allowed to offer all the facts necessary to prove that he is not the father. A child born before the 180th day of the marriage cannot be disowned by the husband, if he had knowledge of the pregnancy before marriage; or if he has been privy to the 'act of birth.' The legitimacy of a child born 300 days after the dissolution of marriage may also be disputed."[3]

64. *Limitations to disclaimer.*—"In the various

[3] *Code Civil* : Art. 312—315 The code adopts the limit of the Roman law as to the *ultimum tempus gestationis* (Dig 38.16 3), or extreme period between the conception and the birth. Lord COKE lays it down as a positive rule that the limitation assigned by English law is nine calendar months, or 280 days (Co. Litt. 123. b.). But though that limit is seldom exceeded, the law, says Stephen, considers it as subject to possible extension, and leaves the point as a matter of fact, in each particular case, to the decision of a jury, who are to judge of it according to the circumstance, and the testimony which persons of experience may give of the course of nature on this subject.

cases wherein the husband is authorised to disclaim, he must do it, within the month, if he is upon the spot where the child is born; within two months after his return, if he was absent at the time; within two months after the discovery of the fraud, if the birth of the child was concealed from him. If the husband be dead, without having made his disclaimer, but being still within the time allowed for the purpose, the heirs shall have two months to contest the legitimacy of the child, reckoning from the time when such child shall have taken possession of the property of the husband, or from the period when the heirs were disturbed in such possession by the child. Every extra-judicial act, containing a disowning on the part of the husband or his heirs, shall be deemed not to have taken place, if it be not followed up, within the term of one month, by an action at law, directed against a guardian *ad-hoc* (for that purpose), named to the child in the presence of its mother.

65. *Proof of filiation.*—"The filiation of legitimate children is proved by the acts of birth inscribed in the registers of the civil state. In default of this title, constant possession of the character of a legitimate child sufficeth. This is established by a sufficient combination of facts shewing the relationship of filiation and kindred between an individual and the family to which he claims to belong. The principal of these are :—that the individual has always borne the name of the father to whom he claims to belong; that the father has treated him as his child, and had provided, in such quality, for his

education, maintenance and establishment ; that he has constantly been acknowledged as such in society ; and that he has been acknowledged as such by the family. No one can claim a character different from that which his title of birth, and the conformable possession of this title, give him ; and reciprocally, no one can contest the character of him who possesses a character conformable to his title of birth. In default of title and constant possession ;—or if the child has been registered, either under false names, or as born of a father and mother not known ;—proof of filiation may be given by witnesses. Nevertheless, this proof can only be admitted, where there is a commencement of proof by writing ; or where the presumptions, or indications resulting from facts till then unimpeached, are sufficiently weighty to determine the allowance. The commencement of proof by writing arises from family documents, from the registers and domestic papers of the father or the mother, from public acts, and even private ones, coming from a party involved in the dispute, or who would have had an interest therein, had he been alive. *Proof to the contrary* may be given by all the means proper for establishing, that the party claiming is not the child of the mother he pretends to have ; or, even if maternity be proved, that such party is not the child of the husband of the mother."[4]

4 *Code Civil* Art. 316—325 Compare the 6 & 7 W. IV., c. 86, regulating the *Registration of births, deaths, and marriages in England*

66. *Evidence of legitimacy : English law.*—The law, in general, presumes against immorality : *odiosa et inhonesta non sunt in lege praesumenda.* On this ground, says Mr. Best, acknowledgment, cohabitation, and reputation are held to be presumptive evidence of marriage ; except in prosecutions for bigamy, and in actions for criminal conversation, in both of which an actual marriage must be proved: in the former, because the accused has the presumption of innocence in his favor ; and in the latter, partly that the action is of the nature of a penal one, but chiefly because it might otherwise be turned to a bad purpose, by persons giving the name and character of wife to women to whom they are not married. One of the strongest illustrations of this principle is, the presumption in favor of the legitimacy of children : *semper praesumitur pro legitimatione, et filiatio non potest probari* (5 Co. 98 b.). A child born after wedlock, of which the mother was even visibly pregnant at the time of the marriage, must be taken to be the offspring of the husband ; and every child born during wedlock, where the married parties are neither *infra nubiles annos*, nor physically disqualified for sexual intercourse, is presumed legitimate, according to the maxim '*pater est, quem nuptiae demonstrant*'[5];—a

5 *Marriage points out the father:* compare sec. 63, and also sec. 71. MONTESQUIEU (Sp. L. lib. 23, c. 2.) has observed that, the establishment of marriage in all civilized states is built on the natural obligation of the father to provide for his children : for it ascertains and makes known the person who is bound to fulfil

presumption which holds even when the parties are living apart by mutual consent; but not when they are separated by a divorce *a mensâ*, in which case obedience to the sentence of the court will be presumed. This presumption of legitimacy, which, in very ancient times, would appear to have been only *præsumptio juris* (1 Phill. Ev. 462, 10th Ed.), was subsequently raised into a conclusive presumption, when the husband was 'within the four seas' at any time during the pregnancy of the wife (Co. Litt. 244. a). The absurd doctrine of making legitimacy rest entirely and conclusively upon the fact of the husband being '*infra quatuor maria*,' was, says Kent, (Lec. XXIX.) exploded in *Pendrell v. Pendrell*, (Str. Rep. 925); and ever since that time, the question of the legitimacy, or illegitimacy, of the child of a married woman has been regarded as a matter of fact resting on decided proof as to the non-access of the husband, and it is a question for a jury to determine. If, however, observes Best, the fact of sexual intercourse between the husband and wife within that time has been established to the satisfaction of the jury, the presumption

that obligation · whereas, in promiscuous and illicit conjunctions, the father is unknown, and the mother finds a thousand obstacles in her way,—shame, remorse, the constraint of her sex, and the rigour of the law,—that stifle her inclinations to perform this duty; and besides, she generally wants ability. For further information on the subject of legitimacy, see the authorities collected in 2 *Kent's Commentaries* p. 218, 7th Ed.; 1 *Jarman's Conveyan. by Sweet*, p. 162; and in *Best's Principles of Evidence*, § 330, 2nd Ed. 1854

cannot be rebutted by proof of adultery, as the law will not in that case allow a balance of evidence as to who was most likely to be the father of the child.

67. LEGITIMATION: *Roman and English Law.*—Children born in lawful wedlock are alone properly speaking legitimate. Four sorts of illegitimate children are mentioned in the civil law:—1 natural, or those born in concubinage, (sec. 18); 2, spurious, or those strictly speaking *filii nullius*; 3, adulterine, where the woman had lived in adultery; and 4, incestuous, where the parents were within the prohibited degrees. *Natural* children, however, might be legitimated in three ways:—by the subsequent marriage of their parents,—which holds good in English law, if the children be begotten, but not born, out of wedlock; by rescript of the emperor, (a mode introduced by Justinian in the 74th Novel,) corresponding with an English act of parliament which, it is said, renders legitimate for all purposes, even so as to inherit land; or by oblation to the *curia*,—which was the class from which, in provincial towns, the magistrates wer holdsble, and of which, until the time of Theodosius and pre entinian, the father who presented his child should be a member. Constantine first ordained that natural children might be made legitimate by the subsequent marriage of their parents; and the doctrine was confirmed by Justinian (Nov. 89. 11.) The law required that at the moment of conception the parents should have been capable of a legal marriage; that an instrument settling the dowry, or at least attesting the marri-

age, should be drawn up; and that the children should ratify the legitimation,—for no one was made legitimate against his will. (*Sandars' Institutes*, p. 121.). The same doctrine was established in the Canon law by a constitution of Pope Alexander III. in 1160; but the Peers of England refused to enact, at the Parliament of Merton (1253,) that the *ante-nati* (or, children *born before* marriage) should be esteemed legitimate,—"the episcopal magnates asking them to consent, as the Church so deemed it; because they did not wish to change what had hitherto been the approved national usage of England."

68. *Policy of the English law.*—Our law, says Blackstone, is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honor and civil society. But, by the Roman law, a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto*;—thereby opening a door to many partialities; and giving a great encouragement to unlawful cohabitation, as it admits of no limitation, as to the time, or number, of bastards so to be legitimated. Moreover, says Stephen, it being one main end of marriage to ascertain some person to whom the care, maintenance and education of the children should belong; this is undoubtedly better answered by legitimating, as with us, all issue born after wedlock, than, as in the Roman law, all issue

of the same parties, even born before wedlock, so as wedlock afterwards ensues: because of the very great uncertainty there will generally be in the proof, that the issue was really begotten by the same man who afterwards becomes husband.[6]

69. *Rights of illegitimate children.*—Though bastards, says Blackstone, are not looked upon as children for any civil purposes, yet the ties of nature are not so easily dissolved. The *Roman law*, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances (Nov. 89, c. 15.), was neither consonant to nature nor reason, however profligate and wicked the parents might justly be esteemed. The method in which, says Stephen, the *English law* provides *maintenance* for them is as follows :—The mother of a bastard is, it would seem, entitled to its custody in preference to its putative father, (*R. v. Hopkins*, 7 East, 579). She too is bound to maintain it as part of her family, while she remains unmarried, or until the child

6 The civil-law rule of retrospective legitimation of antenuptial children (*ante-nati*), not born of incestuous or adulterous intercourse, was adopted to its fullest extent,—"even in favor of *deceased* children who have left issue,"—in the *Code Civil* of France;—in which country, as well as in Scotland, and in most of the states of continental Europe, it has all along obtained under various local modifications; as also in the originally Dutch colonies of Ceylon and the Cape, in the American states deriving their origin from the civil-law countries, and even,—which is noticed as 'a remarkable fact' by Kent,—in many states of English settlement, such as Virginia, Maryland and Georgia, where in other respects the doctrines of the common-law are in general followed

attains the age of sixteen, or gains a settlement in its own right, or being a female is married; and, in the event of the mother's marriage, the same liability attaches to her husband (4 & 5 W. IV, c. 76). If the mother, being of sufficient ability to maintain the child, neglect that duty, so that it becomes chargeable to a parish, she is liable to be punished under the vagrant act; but if, on the other hand, she be not of sufficient ability, the law affords her the means of compelling the father to supply a fund for its maintenance.[7] On the other hand, illegitimate children labour under many peculiar *disabilities*, all founded on the general doctrine that a bastard is, for legal purposes, *filius nullius*:—He cannot claim any share of personal estate under the statute of distribution, as next of kin to a party dying intestate; and if he himself die intestate, and without wife or lawful issue,

7 By 7 & 8 Vict, c. 101 (amended by 8 & 9 Vict. c 10,) any single woman with child, or delivered of one, may, either before the birth, or at any time within twelve months from the birth, make application to a justice of the peace, charging a person by name as the father of her child;—and the evidence on both sides shall be heard, either by the justices in petty session or by a metropolitan police magistrate, and, if the evidence of the mother be corroborated to their satisfaction in some material particular, they may adjudge the man charged with the paternity to be the putative father of such child, and may also, if they think fit, make an order for the payment by him to the mother,—or to some person to be appointed for the custody of the child, in the case of her death, insanity, or imprisonment,—of a weekly sum of money for its maintenance; which order shall be enforced until the child attain the age of thirteen, or die, or the mother be married

the crown is entitled to the administration of his personal estate. He cannot even take property under a bequest, by the mere description of 'child' of his putative father, until he has acquired the reputation of standing in that relation to him. Again, he can neither be heir to any one, nor have an heir, the issue of his own body excepted; and if he purchase land, and die seized of such estate, without having devised it and without lawful issue, it will escheat to the crown, or other lord of the fee.

70. *Hindu law.*—The general rule with regard to marriage (sec. 29) in the present age—the 'kali-yug'—being that the spouses ought to be of the same cast, but of different *gotras* or family-stocks, it would seem *primâ facie* that the fruit of any other connexion must, where such rule is followed, be *illegitimate*,—according to the usual application of that term to the offspring of a woman not legally married to the putative father. It is by no means clear, however, that the law can be so construed in all cases, if in any. The maxim of the civil law, *quod fieri non debet, factum valet*, (what ought not to have taken place, once done is valid,) would seem to obtain; though only, perhaps, in its strict application, —which is, according to Ld. Brougham (6 Cl. and Fin. 708), wherever a form has been omitted, which ought to have been observed, but of which the omission is *ex post facto* immaterial. Thus, it is contended by Ellis (commenting on *case* in 2 Str. H. L. 65,) that illegitimacy cannot result from an irregular intercourse between individuals of the same cast; since, as between them, the

mere connexion is sufficient to constitute a legal marriage, according to the *Gândharv* form ;—and this may be true, notwithstanding that, as objected by Strange, 'nuptial rites are *ordained* in the *Gândharv* form and the rest' (*Devul*, 3 Dig. 606). But, on the other hand, the offspring of a woman of superior cast and a man of inferior cast, being distinctly excluded from the definition of legitimacy, and debarred from its consequence, inheritance (*Mitákshará*, ch. I, sec. xi, 2), is, by such *express exclusion*, withdrawn from the influence of the above maxim ; there being, to use the words of Ld. Mansfield in an English case (R. *v. Loxdale*, 1 Burr. 447 : adopted by Tindal C. J., 1 Scott. 239), "a known distinction between circumstances which are of the *essence* of a thing, required to be done by an act of parliament, and clauses *merely directory*." What the position of the child of a superior father and an inferior mother ought, legally, to be, is not at all clear. For though such conjunctions were anciently, under certain restrictions (*Manu*, ch. III., v. 12 et seq), allowed in marriage, modern cast-usage, without perhaps an exception, considers them at present inadmissible ;—but, how far such rules ought to be held obligatory on persons who may refuse to acknowledge their authority, although in point of speculation a nice question, is not likely to occur very soon in practice, and, at all events, does not come within the scope of an elementary exposition like the present. Illegitimate children have, it would seem, at present a *right to maintenance* only, unless where

custom has perpetuated *rights of inheritance*, such as subsisted under the ancient law, become to the subject at large long since obsolete.

71. *Mahomedan Law.*—If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established. Marriage is defined to be 'a contract founded on the intention of legalizing generation;' and, in cases of proved continual cohabitation, such relationship will be presumed without the testimony of witnesses, (see, sec. 26). A child born six months after marriage is considered, to all intents and purposes, the offspring of the husband; so also a child born within two years after the death of the husband, or after divorce.[9] And so, it was decided in the Privy Council (3 Moore's Ind. App. 295,) that, continued cohabitation and acknowledgment of parentage are sufficient presumptive evidence of wedlock and of legitimacy, according to the doctrines of the Mahomedan law.

8 Compare *Vyawahâr Mayûk*, ch. IV, sec iv, 25—46; *Steele* III, 32; *Strange*, ch. III, and Append. p. 65; and *Morley's Digest: Inherit.*, 44 et seq. . It will be observed that questions regarding *inheritance* and *bequest* are, as a rule, avoided throughout these titles, it having been proposed to treat of SUCCESSION, separately, in the course of which the present lectures are intended to form a part.

9 *Macnaghten's Mahom Law*, ch. VIII, secs. 1, 13, and 31-33.

VII.—PARENT AND CHILD.

72. MUTUAL OBLIGATIONS : *Hindu law.*—The reciprocal duties of parent and child, says Strange, consist in general of protection and instruction on the one hand, and of submission and reverence, as well as of protection, where it may become necessary, on the other. Protection implies maintenance, the obligation to which, as between parent and child, is eventually mutual ; it being equally incumbent on sons to take care that their parent shall not want, as it is on the latter to provide for his children ;—the neglect of which primary duty renders charity and even sacrifice a mere mockery.[1]

[1] *Duty of Maintenance.*—"He, who bestows gifts on strangers, while he suffers his family to live in distress, though he has means to support them, touches his lips with honey, but swallows poison. Such virtue is counterfeit : Even what he does for the sake of his future spiritual body, to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next"—*Manu*, ch. xi., v 9—10 ; and compare *Vrihaspati*. 2 Dig. 131. "Nor of his duty in this respect," observes Strange, "are his children the only objects, co extensive as it is with his family, whatever be its composition, as consisting of other relations and connexions, including illegitimate offspring. It extends to the outcast, if not to the adulterous wife ; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune ; all being entitled to be maintained with food and raiment at least, under the severest sanctions, (*Manu*., ch. ix. 202 ; and 2 Dig. 320). The obligation, moreover, extends, under particular circumstances, to responsibility for each other's debts." Compare *Steele*, 1. 30—33.

73. *The Mahomedan law*, according to Vans Kennedy, obliges the father to provide for the maintenance and education of his children, as long as they remain minors, or while they continue to reside under his protection, whatever their age may be ; and, in return for such support and care, the children are bound to maintain and protect their parents, whenever they are unable, either from sickness, old age, or poverty, to procure a subsistence for themselves. The law, it is said, exempts the mother from contributing in any way to the maintenance or education of her children, and even from nursing them ; but the author of the *Hidayah* observes that, though the mother cannot be obliged by law to suckle her infant, piety demands that she should perform that duty.

74. *The Roman law*, says Blackstone, obliges the parent to provide maintenance for his child ; and if he refuses, '*judex de câre cognoscet*' (let the judge take cognisance thereof). Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing ; and there are fourteen reasons reckoned up (Nov. 115), which may justify such disinherison. If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, as a testament contrary to the natural duty of the parent. And it is remarkable under what color the children were to move for relief in such a case,—by suggesting that the parent had lost the use of his reason, when he made the *inofficious testament*. And this, as Puffendorf observes,

was not to bring into dispute the testator's power of disinheriting his own offspring ; but to examine the motives upon which he did it ; and, if they were found defective in reason, then to set them aside. But, perhaps, this is going rather too far : Every man has, or ought to have, by the laws of society, a power over his own property. And, as Grotius very well distinguishes, natural right obliges to give a *necessary* maintenance to children ; but, what is more than that, they have no other right to, than as it is given them by the favor of their parents.

75. *Code Civil.*—"The spouses, by the sole act of marriage, mutually contract the obligation to nourish, maintain, and bring up their children". (Art. 203.) "Children owe maintenance (*alimens*) to their father and mother, and other ascendants who are in need. Sons-in-law and daughters-in-law, in like manner, and in the same circumstances, owe maintenance to their father-in-law and mother-in-law ; but this obligation ceases, 1°, where the mother-in-law has married a second time ; 2°, where such one of the spouses as produced the affinity, and the children, issue of the union, are dead. Maintenance shall be given in proportion only to the necessities of the person claiming it, and to the means of the person owing it."—(Art. 205—208).

76. *English law.*—However plain the moral obligation that every man shall support and educate his

[2] *Education of Children.*—A parent, as Puffendorf (vi. c. 2. s. 12) well observes, cannot be said to have conferred any benefit upon his child by bringing him into the world, if he afterwards

offspring, it is one, says Stephen, which the common law of England seems to have given no means of enforcing, perhaps because its neglect was considered improbable. But very slight circumstances will be sufficient to raise the presumption of a contract, on the part of the father, to pay for necessaries provided to his infant child; and the statute law, among its other provisions relating to the poor, has made it compulsory upon all parents, whose circumstances enable them to do so, to provide a maintenance for their children, of whatever age, when in poverty, or when unable, through infancy, disease or accident, to support themselves. The corresponding

entirely neglect his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself Yet the laws of most countries, says Blackstone, seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him. Our laws have in one instance made a wise provision for bringing up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children; and are placed out by the public in such a manner as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. Nor ought we to omit, continues Stephen, to remark, in relation to the same subject, that the religious, moral and intellectual training of the lower classes, though not compelled in this country, is nevertheless much encouraged by large parliamentary grants of money annually made "for the purpose of promoting the education of the poor

duties of children to their parents arise from a principle of natural retribution. They, who protected the weakness of our infancy, says Blackstone, are entitled to our protection in the infirmity of their age; and they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. The natural obligation of mutual protection is further recognised by those provisions of the criminal law which justify violence, otherwise punishable, when in defence of the person, either of a parent, or of a child.

77. FATHER'S POWER: 1*st, over child's* PERSON.—The Romans carried further, perhaps, than any people ever did, the notion of the *patria potestas*, which differed originally little, if at all, from the *dominica potestas*, or power of a master over his slaves. "If the sense of ownership was not so complete in the former, it was probably limited more by natural feeling than by law (see sec. 4.). The father could sell, expose, or put to death his children. Time however ameliorated the position of the child; and all that was left was a power to inflict moderate chastisement (Cod. VIII, 47. 31.), and to sell at the time of birth in cases of extreme necessity (Cod. IV, 43. 1.). Constantine condemned the father who killed his child to the punishment of a parricide (C. IX. 17. 1.)" The sale in latter times was mostly fictitious, being the mode by which the child was emancipated.[3]

[3] Sandars' notes to *Institutes*, I 9, and see Gibbon, chap. xliv I.

78. *The Hindu law* gives the father the ordinary power of moderate correction, together with the extraordinary one of *selling* his children,—if by that more be meant than the right, which anciently existed, of selling a son for adoption by the purchaser That the Hindus, however, are in the habit of selling their children, particulary in seasons of distress, says Strange, is certain, as well as that there are texts to warrant it ;—though not one which does not stipulate, as essential to the validity of the sale, the assent of the party interested A text of Yadnyawalkya (II, *Mitákshará*, 68, 2, 16) however, in declaring the power which distress gives to the head of the family, excepts the *son*, as well as the wife, from its operation [4]

[4] "All persons" says Sir Wm MACNAGHTEN, (*Principles of Mahomedan Law*,) "are counted slaves, who may have been sold by their parents in a time of scarcity, and this class is very numerous In India, generally speaking, between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former he is exempt from the common cares of providing for himself and family; his master has an obvious interest in treating him with lenity, and the easy performance of the ordinary household duties is all that is exacted in return The *sales of children*, which take place, are not occasioned by the *aurs sacra fames*, but by absolute physical hunger and starvation; and the morality must be rigid indeed, which would condemn as criminal, the act of a parent parting with a child, under circumstances which render the sacrifice indispensable to the preservation of both 'During a famine, or a dearth', says COLEBROOKE, 'parents have been known to sell their children for prices so very inconsiderable, and little more than nominal,

79. *English law.*—The father is still invested with considerable power :—He is entitled to have the custody and care, and to superintend the education of his children till the age of twenty-one. He may likewise correct them in a reasonable way ; ' for this is for the benefit of their education ' Bl. Com) " The father," says Chancellor KENT (Lec. XXIX), "may obtain the custody of his children by the writ of *habeas-corpus,* when they are improperly detained from him , but the courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere and take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father, against the will of the child. They will consult the inclination of an infant, if it be of a sufficiently mature age to judge for itself, and even control the right of the father to the

that they may, in frequent instances, have credit for a better motive than that of momentarily relieving their own necessities, namely, the saving of their children's lives, by interesting in their preservation persons able to provide nourishment for them The same feeling is often the motive for selling children, when particular circumstances of distress, instead of a general dearth, disable the parents from supporting them There is no reason to believe that they are ever sold from mere avarice, and want of natural affection in the parent the known character of the people, and proved disposition in all the domestic relations, must exempt them from the suspicion of such conduct, but the pressure of *want alone compels the sale,* whether the immediate impulse be consideration for the child, or desire of personal relief ' "

possession and education of his child, when the nature of the case appears to warrant it."[5]

80. *2nd, over* PROPERTY *of child.*—According to the more ancient Roman law, persons under the power of another could neither hold, nor acquire, any property of their own. Whatever the son acquired then belonged to the *pater-familias.* "The *filius-familias* could not make a will, for he had no property to dispose of; nor bring an action, for nothing was owing to him But in all *public* relations, whenever this incapability of possessing property was not in question, the *filius-familias* had all the privileges of a citizen.—he had, for instance, the *connubium*, and could contract a legal marriage;—and the *commercium*, and could, therefore, be a witness in sale by mancipation, to which none except citizens could be witnesses. So too, he could maintain any action as, for instance, for a public wrong, in which the primary object at least, was not to recover money or other property."

81. *By the Hindu law,*—as laid down by Manu and others (2 Dig. 249), children can have no wealth of their own, any more than a wife or a slave. This position, however, should, in the opinion of Strange, be taken, as indeed it purports, to be only a general one, not intended to exclude special rights; and as the doctrine of the Roman law in this respect, was in effect almost

The application of the law of *habeas-corpus* to family relations in India will be found discussed in Sir Erskine Perry's *Oriental Cases*, more particularly in *ex parte Balaram*, pp 516-526

superseded by its provisions regarding certain kinds of *peculium*,[6] so does the Hindu principle admit of similar modifications.

82. *The law of England*,—entitles the father to the benefit of his childrens' labor, as long as they continue to live under his protection;[7] and where the child has acquired any independent estate, the father, as guardian by nature, has generally the charge of it, and may re-

"Formerly," says the *Institutes* (II ix 1), "all that children of either sex under power acquired, excepting *castrensia peculia*, was without distinction acquired for the benefit of their parents. . . We have declared that all which the child obtains by the means of the fortune of the father [termed by commentators *profectitious*] shall, according to the old law, be acquired entirely for the father's benefit: for what hardship is there in that which comes from the father returning to him? *(quod ex patris occasione profectum est, hoc ad eum reverti)* But of everything that the *filius-familias* acquires in any other way [*adventitious*] the father shall have the usufruct, but the son shall retain the ownership."

7 There can be no doubt, says KENT, that this right in the father is perfect while the child is under the age of fourteen years; but as the father's guardianship continues until the child has arrived to full age, the inference would seem to be that he was, in contemplation of the law, entitled to the custody of the persons, and to the value of the services and labour of his children, during their *minority* This is a principle assumed by the elementary writers (I Bl Com. 453), and in several of the judicial decisions; and it would seem that a father may maintain a suit in the admiralty for the wages of a minor son earned in the maritime service *Emancipation*, however, may be inferred, where the father leaves his child to manage and contract for himself, for several years: as it was observed in an American case (*Gale v Parrot*, 1 N. H. Rep. 28,) that if the minor was eloigned from the parent,

ceive the rents and profits during the minority, subject, however, to the liability to account.

83. *Code Civil.*—" The father during the marriage, and, after dissolution of the marriage, the survivor of the father and mother, shall have the enjoyment of the property of their children until the age of eighteen years complete ; or until the emancipation, which may take place prior to the age of eighteen years. . . . This enjoyment shall not take place in favor of such of them, the father and mother, against whom a divorce shall have been pronounced ; and shall cease in regard of the mother, in case of her second marriage. It shall not extend to the property which children may acquire by their own separate labour and industry ; nor to that which shall be given, or left to them, with the express condition, that their father and mother shall not enjoy it." (Art. 384, and 386-387).

84. *Delegation of paternal power.*—The legal power of a father, over the person or property of his children, extends not, in any case, beyond the age of twenty-one, when by English law, " the empire of the father, or other guardian, gives place to the empire of reason." Yet till that age arrives, or till marriage, which is deemed a species of emancipation, this power of the father continues, even after his death :—" For he may by his will appoint a guardian

he might, of necessity, be entitled to receive the fruits of his own labour ; and that it would require only slight circumstances to enable the court to infer the parent's consent to the son's receipt and enjoyment of his own wages

to his unmarried children.[8] He may also delegate part of his parental authority, during his life, to the tutor or school-master of his child,—who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."

85 *Maternal authority.*—The mother has no legal power over the child in the father's lifetime, at least as against the father.[9] But by the 2 & 3 Vict. c. 54,

8 The *patria potestas* being thus artificially extended beyond the farthest limits assigned by nature, a corresponding obligation on the side of the father, to provide by will for the support and establishment of the children, might reasonably be expected. The English law, however, makes no such provision obligatory on the father; leaving every man's property in his own disposal, says Blackstone,—"upon a principle of liberty in this, as well as every other action: though, perhaps, it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence: indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage articles."

9 *Custody of children. comparative rights as between parents.*—"From parentage necessarily flow both the right and duty to educate and maintain the offspring; and from these flows, also, the right to their custody. As between the parents, the law having placed the husband at the head of the family, and made his will paramount whenever he and the wife differ in judgment, and having likewise vested in him the property from which the children must be supported, it follows, of necessity, that he is entitled in preference to her, to their custody also. Yet his superior claim can only be asserted in cases of conflict, and in circumstances where the will of both cannot be regarded; for the natural rights of the mother are the same as those of the father, and can only be

where the child is within seven years, the Lord Chancellor may, upon the mother's petition, unless she has

made to yield to the necessity of a controlling voice in questions of difference In practice, such a conflict could seldom arise while the parents were living together If they were apart, so that the children must be with one or the other of them, the mere fact of the suspension of the cohabitation could not, in this case of consequent difference, shift the general right from the father, in whom it must remain as before; and, this would be the result, where there was a mutual separation by agreement, without any special wrong in either But if the separation was caused purely by the fault of one of them, as the husband, the other, as the wife, could not thereby be lawfully deprived of that society of her children, to which her act of giving them birth had entitled her equally with her husband; and her claim must prevail over his, as far as necessary to her enjoyment of her natural right unimpaired; and he could not complain of the consequences of his own misconduct.

* * * *

Their subserviency to superior rights and interests—"Two other principles should constantly control and modify the foregoing First, that children are not born for the benefit of the parents alone, but for the country; and, therefore, that the interests of the public in their morals and education should be protected; Secondly, that the children, though younger in years, have themselves an interest even more sacred than their parents, and more deserving of protection. With the parent it is a question of gratification; with the childless it the highest interest, involving his morals and education. the interests of the community and of the child necessarily harmonize, and therefore, *the good of the child should be the leading consideration.* And this, it may be observed, will rarely require that he be placed beyond the control of both parents: for care that is prompted by the parental instinct, and responded to by filial affection, is the most valuable of all But when the parents are separate, this consideration is balanced between the two; yet the inferior parental rights of the one parent or the other exist Upon principle, therefore, the rule would seem

been adjudged an adulteress, make an order on the father, or testamentary guardian, to deliver it into her custody. After the father's death, however, she is entitled to the custody of the infant until twenty-one; and, by the Marriage Act (4 Geo. IV, c 76), where there is no other guardian appointed, the mother, if unmarried, stands in the father's place, after his death, as to the consent required to the child's marriage during minority [10] But she cannot, like the father, appoint a guardian by will, as she is not mentioned in the statute (12 Car. II, c. 24), by virtue of which he enjoys that

to be, that *primâ facie*, after a separation, the father is entitled to the custody of the children, unless there be a divorce for his fault, in which case the mother is entitled,—yet that this *primâ facie* right must always be subject to the superior claims, that is, the good of the children"—*Bishop's Commentaries* § 641—643

[10] "*Consent of parents and guardians* was, by 26 Geo II, c 33, and 4 Geo IV, c 17, made *essential* to the validity of all marriages of minors by license,—not being widowers or widows, who were deemed to be emancipated,—so that after a marriage had been actually celebrated and consummated, and followed by the procreation of children and a lengthened cohabitation, it might be annulled, by the ecclesiastical court, and declared void *ab initio*, by reason of the want of such consent prior to the celebration of the nuptials But this was found to be productive of so much mischief, that these acts were repealed; and, by the law as it now stands (4 Geo. IV, c. 76, and 6 & 7 W. IV, c 85) if, notwithstanding the precautions taken, a party being a minor does actually succeed in getting the marriage ceremony performed, the marriage shall *not* be accounted *void by reason of the non-consent* of parents or guardians."— 2 *Addison on Contracts* 857. Compare *Code Civil*, art 182 et seq, and see above, sec 25.

privilege ; and the appointment of one by her husband supersedes her 'guardianship by nature and nurture.' (2 *Leading Cases in Eq* 494). By the provisions of the French code (art. 390—396) the guardianship devolves on the mother ; but the father may appoint a '*special counsel*, without whose advice she shall do no act relating to the guardianship.'

86. It is curious that the above-mentioned recent English enactment, in favor of the mother's natural right to the care of her infant child, should have been anticipated by the provisions of the *Mahomedan law* ;—according to which, as interpreted by Vans Kennedy, the *sons* should remain with their mother, or other female relation, until they are able to walk, according to some jurists, and according to others, until they are seven years old ; and though the *daughters* may be withdrawn at the same age, it is recommended that they should remain, as long as they are minors, under the care of their mother or other female relation · after which the sons and daughters are to be placed under the immediate protection of the father.

VIII.—MINORITY AND TUTELAGE.

87. *The law of majority*,—says a recent author, is a social institution which varies with the governments, the habits, and the climates of all countries; but, above all, it is affected by the development of moral organization, —natural capacity being the true measure of *legal* capacity. Majority is fixed at twenty-one in the United Kingdom, the United States, France, and Russia; at twenty-three in Holland; at twenty-four in Austria and Prussia; and at twenty-five in Spain, Portugal, and the Cape of Good Hope.[1]

88. *Hindu law*.—"The sixteenth year," says Morley (Digest: *Infant*), "limits the term of Hindu majority, according to several parallel texts; but opinions vary as

1 *Levi's Manual of Mercantile Law* London 1854. Mr. Levi, referring to the fact that minors in Scotland have greater latitude in their power of contracting than in England, suggests that the difference between the law of both countries might be removed by fixing for the United Kingdom *eighteen years*, as the age at which a person may bind himself by his acts of trade and be held responsible for all engagements "When," says he, "we consider the amount of information generally possessed by young men devoted to mercantile pursuits, and the business habits which they early acquire, the complete disability which attaches till the age of twenty-one may prove in many cases most injurious. No inconvenience was experienced in France when the age of majority was changed from twenty-five to twenty-one; and such is the physical and mental development now in progress in this and other countries, that a *reform* in this great social institution may be rendered necessary."

to whether the limit be the first or the last day." According to the Bengal jurists, the age of adolescence begins with the first day—that is, after *fifteen years* complete; but the Company's Regulations have extended the minority of Hindus, as well as of Mahomedans, to the expiration of the *eighteenth* year. By the customary cast-law of Western India, majority is attained "at an age not precisely limited between fifteen and twenty-five, when a son is able to conduct the affairs of the family, or to acquire his own livelihood." A girl is generally deemed to be of age at her marriage; but women, in the higher casts at least, are considered, as in the Roman law (sec. 34) to be always more or less under tutelage.[2]

89. *Mahomedan law.*—All persons, says Macnaghten, whether male or female, are considered minors till after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period. There is a subdivison of minority, though not so minute as in the civil law,—the term *suby* being applied to persons in a state of infancy, and *mûrahiq* to those who have nearly attained puberty. "It is singular," observes Vans Kennedy, "that a point of so much importance, as the exact age at which a *minor* becomes capable of acting

[2] Compare, 1 *Colebrooke's Digest.* p 291 et seq., 1 Macn *Princ* H L 103; and *Steele* 111, 27 A minor (*bâl*), says Colebrooke (*note*, 1 Dig 293), is called *kumâr* to the end of his fourth year, and in law is an infant, *sisu*, to the end of his seventh year. He is a boy, *pogend*, from his fifth to the end of his ninth year; and his adolescence, as *kisor*, continues from the tenth to the end of the fifteenth year

for himself, should have occasioned so many different opinions amongst the Mahomedan jurists as to leave it nearly undetermined. . . But all the jurists lay it down that the earliest period of puberty with regard to a boy is twelve years, and with respect to a girl, nine years; and it is evident that this opinion will hold good in almost every country in which Islamism prevails. It is also certain that the power of the father over the child, and of the guardian over the ward, does not cease at this early age; but I cannot discover any passage in the *Hidáyah* which authorises the distinction between being of age, and being of years of discretion."

90. TUTELAGE.—"That impubers[3] should be in tute-

[3] Solon, who was a poet as well as a legislator, in a considerable elegiac fragment, preserved in the *Stromata* of Clemens Alexandrinus, divides human life into ten *hebdomads*, or periods of seven years; assigning to each its proper physical or mental characteristic. He thinks, for instance, that a man "ought to be mindful of *marriage* and looking forward to progeny," in his 5th hebdomad, that is after the age of 28. This mode of division was followed by the Alexandrine philosophers with whom the 'mystic seven' was a favorite number; and subsequently adopted by the canonists:—the first two septenaries being included in *pueritia* or boyhood, during the first seven years of which the child was, in the limited sense of the term, *infans* (non-speaking) νηπιοσ; and the next two periods corresponding with *adolescentia* or youth, the first half of which was called, specifically, the age of *puberty* ἡβη But, though all these terms are used by classical Roman writers, such was not the usually recognised legal division. The great distinction in law was into *majors* and *minors*; the latter comprehending *pubers* and *impubers*. The full age of puberty, *plena pubertas*, was eighteen years complete; and the full majority at twenty-five.

lage," says the *Institutes* (lib. I, tit. XX, 6) "is agreeable to natural law; so that, whoever is not of full age, may be under the government of another." When the need of protection and assistance arose from youth, the supplementary legal relation was called a tutor; when it arose from mental incapacity, he was called a curator. The two offices much resembled each other; but there was one leading distinction:—the *tutor* was given to the *person*; the *curator*, to the *property*,—his duty being, exclusively, to see that the person under his care did not waste his goods. A tutor could not be appointed for a particular object or business (*personæ, non rei, datur*), and hence the guardian *ad litem* of the Roman law was a curator. "Parents may give *tutors by testament*, to such of their children as have not attained the age of puberty, and are under their power"—(tit. XIII) "They, to whom no tutor has been appointed by testament, have their *agnati* as 'tutors legitimate,' according to the law of the XII. *Tables*"—(tit. XV). The father also might become the tutor of his own child:—"The law gave the patron the right of succession to the inheritance of the freedman; and, as the right of succession was connected with the tutelage in the case of *agnati*, it seemed natural to connect the two in the case of the *patron* (tit. XVII). The person who emancipated the child succeeded to all the rights of a patron over the child; if it was the father, then, as being a patron, he was included in the terms of the law of the XII. *Tables*, and was a *tutor legitimus*, (Dig. XXVI, 4. 3)."

91. *Curation.*—"Pupils, both male and female, are freed from tutelage, when they become pubers"—(tit. XXII). "Males arrived at the age of puberty, and females of a marriageable age, receive curators, until they have completed their twenty-fifth year; for, although they have attained the age of puberty, they are still of an age which makes them unfit to protect their own interests"—(tit. XXIII). The law of the XII. *Tables*, observes SANDARS, provided for the appointment of curators, in the case of *madmen and prodigals*; but made no provision for the protection of *pubers*. Moreover, the word *furiosi*, mad as opposed to imbecile, was taken strictly; so that there was no legal curator for any one suffering from any other form of mental malady. Marcus Antoninus first ordered that curators should be given in all cases, without inquiry, on the application of the puber; and, practically, he was almost sure to apply for one, as it was part of his tutor's duty to urge him to do so. Justinian further decided (tit. XXIII.) that curators should be assigned "to persons of unsound mind, to the deaf, to the mute, and to persons labouring under any perpetual malady, since they are unable to manage their own affairs."

92. INFANTS—under English law—have various *privileges* and various *disabilities*;—"but their very disabilities are, for the most part, privileges; in order to secure them from hurting themselves by their own improvident acts," (Bl. Com.) An infant cannot be sued, but under the protection, and joining the name, of his guar-

dian, appointed by the court for the purpose of the particular suit (*ad litem*); and, on the other hand, he may, by leave of the court, sue either by a guardian, or, what amounts to the same thing, by his *prochein amy*, or 'next friend' willing to undertake his cause. (Co. Litt. 135 b). There is also a maxim, that *no laches*, or negligence, shall be imputed to an infant; but this, says Stephen, is chiefly true of the exemption that he enjoys from the ordinary bar by lapse of time. As to *disabilities*, they are very extensive:—"It may be laid down generally, that infants cannot make any conveyance, or purchase, that will bind them; nor hold any public office of pecuniary trust, or any office, as it would seem, of a judicial kind. But, though an infant is, generally, under these disabilities, where he acts on his own account, yet he is under none to act as *agent* for another; for the person by whom he is appointed agent is the best judge of his ability in that particular case. And, though infants cannot so alienne, or purchase estates, but that the transaction shall be voidable at their pleasure (Co. Litt. 2 b), on the attainment of full age; yet, by 13 & 14 Vict., c. 60, ss. 7 and 20, it shall be lawful for the court of chancery to make an order, vesting the lands of which any infant may be possessed, as trustee or mortgagee, in such person, and in such manner, as the court shall direct; or to appoint a person to convey the same;—which shall have the same effect as if the infant had been twenty-one, and had duly executed a conveyance of the estate."

93. *Capacity to contract qualified.*—Infants, says

ADDISON, are by reason of their inexperience and the immaturity of their judgment, clothed only with a qualified power of contracting: i. e., their contracts will bind them, provided they were necessary and for their advantage; but, if unnecessary and improper for them to have entered into, they will be entitled to recede from them. Accordingly, all penal obligations entered into by infants are absolutely void: as it cannot be for their benefit to subject themselves to a penalty. (Co. Litt. 172, a.) Contracts by infants for the sale of their necessary wearing apparel, ornaments of their person, and the like, are likewise void; as also for the borrowing of money: 'for the infant may misapply the money, and the law will not trust him;'—but if money is laid out, by another person, in the purchase of the necessaries of life for an infant, such money may be recovered from the latter, in an action of '*money paid* for his use.' Again, the law will raise no implied promise from an infant, in respect of an account stated; as it presumes that he has not sufficient capacity for business to settle an account, so as to be bound thereby. And so, contracts entered into in the exercise of a trade may, it is said, be avoided by him: 'for the law does not consider it to be necessary or beneficial for infants to embark in trade, and hazard their fortune in commercial speculations;'—and hence, it has been decided that an infant cannot be sued on a bill of exchange, as being a mercantile instrument, although it may have been drawn, or accepted, by him on account of necessa-

ries; and for the same reason,—namely, that an infant is not supposed capable of understanding legal forms,—he is not bound by the recitals in any deed executed by him during infancy.

94. *Infancy is a personal privilege*,—of which no one can take advantage but the infant himself; and therefore, though the contract of the infant be voidable, yet it shall bind the person of full age: for, being an indulgence which the law allows infants to protect them from the fraud of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security (Bacon's Abr., *Infants*). It is no answer then, says Addison, to an action brought by the infant against the adult party to the contract, to say that, as the infant is protected from liability, there is no mutuality of contract or reciprocity of obligation.[4]

4 *Roman law: privilege of pupils.*—"In some cases it is necessary that the tutor should authorize the acts of the pupil, in others not. When, for instance, the pupil stipulates for something to be given him, the authorization of the tutor is not requisite, but if the pupil makes the promise, it is requisite: for the rule is, that pupils may make their condition better, but may not make it worse, without the authorization of their tutors. And therefore, in all cases of reciprocal obligation, as in contracts of buying and selling, letting and hiring, deposits, mandates, &c., if the tutor does not authorize the pupil to enter into the contract, the person who contracts with the pupil is bound, but the pupil is not bound."—*Institutes* Lib. i, Tit. xxi. When, observes Saunders, it is said that a pupil took every benefit of the contract, it must not be under-

95. *Contracts for necessaries.*—If an infant lives with a parent, who provides what appears to the parent to be proper, the child cannot bind himself to a stranger, even for what might otherwise be allowed as necessaries. But if, on the other hand, the infant is an orphan, or is residing at a distance from his parents, and is not provided with the necessaries of life under their personal superintendance and control, he is clothed with the power of entering into fair and reasonable contracts for supplying himself with such things as are absolutely necessary to all persons, such as food, clothing, lodging, and, also, instruction, 'whereby he may profit himself in after life;'—for if infants were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age. (Co. Litt. 172, a.) The infant, however, cannot bind himself to the payment of any particular sum for necessaries: as the law permits those who minister to his necessities to receive only a reasonable price, 'and does not leave the determination of the amount to the infant, but entrusts it to the arbitrament of a jury.'

stood that he could continue to enjoy at pleasure the advantages of another's property, without giving anything for the enjoyment. The original owner might reclaim the property; and, if a profit was being derived from its possession, might take that profit to himself (D xxvi, 8 5 1) Only he could never make the pupil restore or refund anything that was once gone, and while a pupil could always disclaim an executory contract made to his disadvantage, he could always, through the intervention of his tutor, enforce one that promised to benefit him.

96. *What things are necessaries,*—suitable for an infant who is living away from the parental roof, and who supplies his own wants, from funds of which he has himself the management,—is, says Addison, a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant, under any circumstances, and respecting which no valid contract can be entered into For example, race-horses, luxurious dinners, choice wines, or costly equipages and horses, are not necessaries; and an action cannot, consequently, be maintained against an adult, for the price of such things furnished to him during his infancy. But if the infant, after he has attained his majority, keeps the things, and at the same time repudiates the contract of sale and refuses to pay the price of them; the right of property revests in the vendor,—the contract being at an end,—and the quondam infant cannot lawfully detain them, after their return has been demanded by the true owner: for the privilege of infancy, is to be used 'as a shield, and not as a sword'; as a defence against the demands of unconscientious and rapacious creditors, and not as an offensive weapon of fraud. "If," says PALEY, "a young man perceives that he has been imposed upon, he may honestly avail himself of the privilege of his non-age to defeat the circumvention; but if he shelters himself under this privilege to avoid a fair obligation, he extends the privilege to a case in which, in intention of law, it is not

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allowed, and in which, consequently, it does not in natural justice exist."

97. *Ratification.*—The statute of 9 Geo. IV., c. 14, s. 15, enacts that no action shall be maintained, whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy; or upon any ratification, after full age, of any promise made during infancy:—unless such promise, or ratification, shall be made by some *writing signed by the party to be charged therewith.* The mere fact of the ratification of the debt, or of the making of the promise, is all that is required by the statute to be evidenced by writing; but it requires the writing to be signed by the party himself, and does not, like the statute of frauds, provide for a signature by an agent. Such ratification relates back and gives effect to the original claim, and fixes the defendant with an obligation springing out of the old contract. Thus, if an infant has borrowed money, and, after attaining his majority, signs with his own hand a written promise to pay the amount; or if, having had dealings with an adult, he meets and settles accounts with him, during his infancy, in the ordinary way, and a balance is struck, and, on attaining age, he confirms the settlement, and signs a written agreement to pay such balance; he will, in either case, be liable for the amount. "The principle," says Parke B., (*Williams v. Moor*, 11 M. & W. 264.) "on which the law allows a party, who has attained his age of twenty-one years, to give validity to contracts

entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he *ought* to be bound"

98 APPOINTMENT OF GUARDIAN *Hindu law* — The sovereign who is, says Strange, failing all others, the ultimate heir of all, Brahmans excepted, is also, to an extent beyond what is recognised in our court of chancery, the universal superintendant of those who cannot take care of themselves. In this capacity, it rests with him, i e with the judicial power exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations, preferring always the paternal male kindred to a maternal ancestor, or, female (3 Dig 542, et seq). "It is stated that, in practice, the mother is the guardian (3 Dig. 544), but, as a Hindu widow is herself liable to the same sort of tutelage, it is more correct to regard her as proper to be consulted on the appointment of one,—and, if of competent understanding, the concurrence of the minor himself is not to be disregarded · all of which only shows how much the choice is a matter of sound discretion"

99, *The Mahomedan law*, likewise, assigns the guardianship to the nearest male relation, and prefers the paternal to the maternal line, and, if there be no relations the charge of the infant rests with the *kazy*. (*Vans Kennedy's Abstract*) The mother's natural rights

of custody (sec. 86) are forfeited by marrying a stranger, but revert, on her again becoming a widow. The father and grandfather are competent to the office of *curator*, as well as *tutor*, (or, as expressed in the Company's Regulations, of *manager*, as well as *guardian*); but their executors, being strangers, can act as curators only; and the other relations,—who succeed to the *tutela*, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor,—as tutors only. (*Macnaghten.*)

100. *The Roman law* committed the care of the minor to him who was to succeed next to the inheritance, presuming that the nearest heir would take the best care of an estate to which he himself had the prospect of succeeding;—"And this," says Blackstone, "they (the civilians) boast to be '*summa providentia*': but, in the mean time, they seem to have forgotten, how much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate, for which he is supposed to have so great a regard; and this affords Fortescue and Sir Edward Coke an ample opportunity for triumph,—they affirming that to commit the custody of an infant to him that is next in succession is '*quasi agnum committere lupo, ad devorandum*,' (as it were to entrust a lamb to a wolf, to be devoured)". The authority of Solon, who, it is said (*Potter's Antiq.* I. 26) made a like rule at Athens, has also been referred to, in confirmation of the "wisdom of our English law" in this matter; but Lord Macclesfield more pro-

entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he *ought* to be bound."

98. APPOINTMENT OF GUARDIAN: *Hindu law.*—The sovereign who is, says Strange, failing all others, the ultimate heir of all, Brahmans excepted, is also, to an extent beyond what is recognised in our court of chancery, the universal superintendant of those who cannot take care of themselves. In this capacity, it rests with him, i. e. with the judicial power exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor, or, female (3 Dig. 542, et seq.). "It is stated that, in practice, the mother is the guardian (3 Dig. 544); but, as a Hindu widow is herself liable to the same sort of tutelage, it is more correct to regard her as proper to be consulted on the appointment of one;—and, if of competent understanding, the concurrence of the minor himself is not to be disregarded: all of which only shows how much the choice is a matter of sound discretion."

99. *The Mahomedan law*, likewise, assigns the guardianship to the nearest male relation, and prefers the paternal to the maternal line; and, if there be no relations, the charge of the infant rests with the *kazy*. (*Vans Kennedy's Abstract*). The mother's natural rights

IX.—ADOPTION.

102. ROMAN LAW: *Forms of procedure.*—A public interest long attached to so important an alteration in families as adoption. The sanction of the *comitia curiata* was, under the ancient law, necessary to its validity. If the person adopted was *sui juris*, and within the privileged circle of the *gentes*, his entry into a new family, *arrogatio*, was jealously watched; as the pontiffs would never allow it, where there was any likelihood of the sacred rites of the family he quitted becoming extinct by his departure from it. Subsequently, the *rescript of the emperor* was substituted for the consent of the *curiae*, as a means of regulating arrogations. What were the forms of *arrogation*, observes SANDARS, when the persons arrogated and arrogating did not belong to the body of the *curiae*, we have no certain knowledge; but we may presume, it was by a fictitious suit, in which the person arrogated was claimed as the child of the arrogator, and let judgment go by default. In the case of *adoption*, on the contrary, we do not know any particulars of the interference of the *curiae* in the matter; but we know the form by which it was accomplished, when conducted simply as between private individuals. Children *in potestate* were adopted, by the person under whose power the child was, selling him three several times by a peculiar form called *mancipatio*, which destroyed his own *patria potestas*; and then giving him up to the adopting parent by a fictitious

process of law called '*in jure cessio*,' in which he was claimed and acknowledged as child of the adoptator, and pronounced to be so by the magistrates who could try such a case. For the ceremonies previously required for the adoption of a person *alieni juris*, Justinian substituted the simple proceeding of executing, in presence of a magistrate, a deed declaring the fact of adoption; all parties to the contract—the giving, the receiving, and the given—being personally present to record their consent; though, with regard to the party adopted, the absence of dissent was sufficient, *non contra-dicente* (Code VIII. 48. 11). Hence *adoption*, specifically so called, is directed in the *Institutes* (lib. I, tit. XI, 1), to be effected by the *imperium magistratûs*; while the *rescriptum principis* is stated to be the proper mode of authorising *arrogation*.

103. *Age and sex of the parties.*—"A younger person," says the *Institutes* (tit. XI, 4), "cannot adopt an older: for adoption imitates nature; and it seems unnatural that a son should be older than his father. Any one, therefore, who wishes either to adopt or arrogate a son, should be the elder by the term of complete puberty—that is, by eighteen years." As adoption follows nature, it would have seemed that none but married persons could have adopted; but "one may adopt a grandson or grand-daughter, &c, although he has no son." As long, observes Sandars, as the required number of years intervened, there was no further positive rule as to age; but, it being in the discretion of the em-

peror to allow adoption or not, there was generally a disposition to refuse it, unless the person who wished to adopt was of such an age as to make it improbable he should have children of his own. *Women* could not, properly speaking, adopt; but,—" by the *indulgence* of the emperor, and as a comfort for the loss of their own children,"—(XI, 10) they were eventually permitted to do so. The adoption here alluded to, which was introduced by a constitution of Diocletian and Maximian (Code VIII, 48, 5), placed the adopted children in the same relation to the mother adopting, as her own children would have been; but, " as women have not *even their natural* children in their power," they, of course, acquired nothing resembling the *patria potestas* over such children as they were allowed to adopt.

104. *The effect of adoption*,—before the time of Justinian,—was to place the person adopted exactly in the position he would have held, had he been *born* a son of the person adopting him. All the property of the adoptive son belonged to his adoptive father: that is, in cases of arrogation; for, where the adopted was previously in the power of his natural father, he had no property to pass. On the other hand, the son was heir to his adoptive father, if intestate, bore his name; and shared the sacred rites of the family he entered. *Marriage*, also, was prohibited between the adopted and the family of the adopter. If the agnatic tie was dissolved by emancipation, the tie of blood, if any, would of course remain, and be a bar to the marriage (sec. 30); but, if there were no tie

of blood, that is, if one of the parties had entered the family by adoption, then, if the emancipated person had, while the agnation subsisted, occupied the position of ascendant or descendant to the other person, marriage was forbidden; but if of a collateral, it was allowed (tit. x. *De Nuptiis*, 1-2). Hence, observes Sandars, the adoptive son is said to be assimilated to the son born in matrimony, in many points (*in plurimis causis*, XI 8,), but not altogether; because, among other differences, if the adoptive son left his adopted family, he ceased to have any relationship to its members; whereas the natural son was always *cognatus* to his own blood-relations, although, by emancipation or adoption, he might cease to be *agnatus* to them.

105. *Justinian*,—both by sanctioning the changes made by former emperors, as well as by introducing several more,—completely altered the character of the old law of adoption. "Now," says the *Institutes* (XI, 2), by our constitution (in Code VIII. 48, 10), when a *filius-familias* is given by his natural father to a stranger (*extraneae personae*), the power of the natural father is not dissolved: no right passes to the adoptive father, nor is the adopted son in his power; although we allow such son the rights of succession to his adoptive father dying intestate. But, if the natural father should give his son in adoption, not to a stranger, but to the son's maternal, or—supposing the father *emancipated*—to his paternal grandfather, or to a great grandfather; in this case, as the rights of *nature and adoption concur*

in the same person, the power of the adoptive father, knit by natural ties and strengthened by the bond of adoption, is preserved undiminished ; so that the adopted son is in the *power*, as well as in the *family*, of the adoptive father".

106. THE CODE NAPOLEON, in its *Adoption and Officious Tutelage* (C. CIVIL, LIV. I, TIT. VIII), presents very distinctly the modern features of the institution; which, though shorn of its ancient solemnities, and deprived of its characteristic religious sanction (sec. 12), even before the days of Justinian legislation, has still continued to survive its humiliation, under the less imposing guise of a merely legal quasi-domestic reciprocal tie.[1]

107. *Capacity of parties.*—" Adoption is not permitted but to persons of either sex upwards of fifty years of age, who shall have, at the time of adoption, neither legitimate children or other descendants, and who shall be at least fifteen years older than the persons whom they propose to adopt. It can only be exercised in favor of an individual to whom, during his minority and for six years at least, the party adopting shall have furnished assistance and bestowed unremitting care; or in favor of one who shall have saved the life of the adopter, either in battle or by rescuing him from the flames or the waters. If the party adopting be married, the other of the

Adoption, says Dr. Hallifax (*El R Civil L*), was never practised in England; nor have we any laws concerning it The practice, as observed by Strange, can be traced if at all, only in the condition, not unfrequently imposed by wills on *devisees*, to take the *name* of the testator.

spouses must consent. Adoption cannot in any case take place before the *majority* of the adopted;—who, if he has father and mother, or one of them living, and if he has not completed his twenty-fifth year, shall be bound to produce a consent given by both, or by the survivor; and, if he be above the age of twenty-five, he shall be bound to ask their advice"

108. *Effects of the contract*—"Adoption shall confer the *name* of the adopter on the adopted, in addition to the proper name of the latter. The adopted shall continue in his natural family, and shall there retain all his rights Nevertheless, *marriage* is prohibited between the adopter and the adopted and his descendants, between the adopted children of the same individual; between the adopted and the children who may be born to the adopter, between the adopted and the husband or wife of the adopter, and reciprocally between the adopter and the husband or wife of the adopted. . . The adopted shall acquire no right of 'successibility' over the *property* of the adopter's kindred, but shall have the same rights in the *succession* of the adopter, as a child born in marriage would have, even where there shall be other children of the latter description born subsequent to the adoption."

109. *Officious Tutelage*—"Every person aged upwards of fifty years, and being without legitimate children or descendants, who would, during the *minority* of an individual, attach him to himself by a legal title, may become the 'officious tutor' of such individual, on obtaining

the consent of the father and mother of the child, or of the survivor of them, or, for want of them, of the *family council* (see Art. 407 et seq.), or &c. . . Such tutelage can only take place in favor of children under fifteen years of age. It shall carry with it, without prejudice to any particular stipulations, the obligation of nourishing the pupil, of bringing him up, and of putting him in a situation to gain a livelihood. If the pupil has any property and was previously in tutelage, the administration of his *property*, as well as of his *person*, shall pass to the officious tutor, who, nevertheless, shall not apply the revenues of the pupil to the expenses of his education. . . If upon the *majority* of the pupil, his officious tutor wishes to adopt him, and the former *consent* thereto, adoption shall take place, according to the forms prescribed (Art. 353—360), and the effects thereof shall be, in all respects, the same."

110. HINDU ADOPTION.—The modern French adoption, it will be seen, as little resembles the ancient rite of the *pontifices*, as a French gentleman of the present age does the Roman gentile in the days of that royal jurist[2] who declared the *sacra privata*, or peculiar cere-

[2] "Renowned at that time for justice and religion was NUMA POMPILIUS, an inhabitant of Cures, a Sabine town; and as well acquainted, as any person could be in that age, with all law, divine and human. . . . Appointed king, he prepares to build afresh, with justice, and with laws and customs, that same city which had been lately built by force and arms . . He subjected to the ordinances of the pontiffs all other public and private sacred rites; that the people might have where to come for

consultation lest, by the *neglect of ancestral rites*, and the substitution of foreign ones, any *disturbance in divine law* might tude of the sacerdotal college, as the assiduous attendance in the fire-temple of Vesta. Many generations, probably, before the silent priestess ascended the Capitol on her anxious watch,—in times, perhaps, when the common ancestors of Franks and Latins hurled their javelins against strangers from the inhospitable shores of the Caucasian sea,—their then more civilized kinsmen, the Eastern Iranians, received from their sacerdotal guides the approved forms of the same ancient rite, which their descendants among the Hindus have to this day maintained inviolate; planted in the depths of inveterate Custom, which, though ever fluctuating on the surface, continues as essentially unchanged as the shifting sand of an unproductive Sahara.

111. *Its religious character.*—" Marriage," says Strange, " failing in this its most important object (the birth of a *son*), in order that obsequies in particular might not go unperformed, and celestial bliss be thereby forfeited, as well for ancestors as for the deceased, dying without leaving legitimate issue begotten, the old law was provident to excess; whence the different sorts of sons enumerated by the different authorities, all resolving themselves, with *Manu* (ch. IX, v. 158 et seq), into twelve,—the legally-begotten (*auras*), and eleven

consultation lest, by the *neglect of ancestral rites*, and the substitution of foreign ones, any *disturbance in divine law* might ensue "—*Livy's Roman History*. Bk. I ch. XVIII XX

wife also A wife may adopt with the assent of her husband; likewise a widow with the husband's authority, and of inheritance. . . It is true that, failing a son, a Hindu's obsequies may be performed by his widow; or, in default of her, by a whole brother, or by other heirs (*Vrihaspati*, 3 Dig. 458); but, according to the conception belonging to the subject, not with the same benefit as by a son. That a son, therefore, of some description, is with him, in a spiritual sense, next to indispensable is abundantly certain. As for obtaining one in a natural way, there is an express ceremony, that takes place at the expiration of the third month of pregnancy, marking distinctly the importance of a *son born*; so is the adopting of one as anxiously inculcated, when prayers and ceremonies for the desired issue have failed in their effect (*Datt. Mim.*, sec 1, 3) But, exacted as it is wherever the want exists, in terms sufficiently peremptory, it is a *right*, and not a *duty* to be enforced by the civil power."

112. *Essentials of the contract.*—The right to adopt is absolute in the husband (3 Dig, 244), though, adoption having taken place, the adopted becomes son to the wife also A wife may adopt with the assent of her husband; likewise a widow with the husband's authority, —written, or, if proved by witnesses, verbal. There is some difference of opinion, between jurists of the various schools, as to whether the husband's authority is absolutely necessary In Bengal *Proper* it is indispensable, in the opinion of Colebrooke (commenting on *Case* in 2 Str.

H. L. 96); but according to the doctrine of the Benares and Mahârâshtra schools, and wherever the authority of *Vidnyâneshwar* prevails, it may be supplied by the assent of the husband's kindred,—the widow's natural guardians. As a general rule, the right to *give* for adoption corresponds with the right to adopt. In selecting a boy for adoption, attention must be paid, 1st, to the *cast*: which, as in marriage, must be the same;—2nd, to *relation to the adopter*: one, with whose mother the adopter could not legally have married, must not be adopted (*Sutherland's Synopsis*, p. 214; and compare sec. 70);—3rd, to *age*: the adopted must be such as that he might have been, as regards years, the son of the adopter. Subject to these general principles, the nearest male relation is the proper object. The fifth *year* is often mentioned as the extreme one for adoption: but this depends chiefly upon whether certain ceremonies have been performed for the boy in his natural family,—the time for which again generally varies in the different casts; and whether or not is of less consequence, in proportion as he is nearly related to the family of his adoptive father. The *consent* of the boy is also said to be necessary; but, as he is generally *given* in early childhood, he is considered (2 Dig. 106) to be bound, as in marriage (sec. 25), by the act of those who consent *for* him.

113. *Its effects.*—When, says Jagannâth (3 Dig. 149), he who has procreated a son gives him to another, and the child so given is *born again* by the rites of initiation,

then his relation to the giver ceases, and a relation to the adopter commences. "Adoption," continues Strange, "being a substitution for a son begotten, its effect is, by transferring the adopted son from his own family, to constitute him son to the adopter, with a consequent exchange of rights and duties. Of these the principal are the right of *succession* to the adopter on the one hand, with the correlating duty of performing for him his last *obsequies* on the other." In the event of a son being afterwards born to the adopter, or of a son appearing after his supposed death, the general rule,—subject to exception in cases of particular custom,—is, that both, the *auras-putar* and the *datt-putar*, inherit the father's property in equal shares. The adopted son has no right, generally, to inherit any share in the estate of his *natural* father, which follows the funeral oblations; nor, on the other hand, is he liable to pay his debts. *Marriage* is forbidden within the prohibited degrees of both families.

APPENDIX No. I.

RAJA RAM-MOHUN ROY'S REMARKS

REGARDING MODERN ENCROACHMENTS ON THE

ANCIENT RIGHTS OF HINDU FEMALES.

[Calcutta: 1822.]

[INTRODUCTORY.]—"When the division into casts was first introduced among the inhabitants of India, the second tribe, who were appointed to defend and rule the country, having adopted arbitrary and despotic practices, the others revolted against them; and under the personal command of the celebrated Purushram, defeated the royalists in several battles, and put cruelly to death almost all the males of that tribe. It was at last resolved that the *legislative* authority should be confined to the first class who should have no share in the actual government of the state, or in managing the revenue of the country under any pretence; while the second tribe should exercise the *executive* authority. The consequence was, that India enjoyed peace and harmony for a great many centuries. The Brahmans having no expectation of holding office, or of partaking of any kind of political promotion, devoted their time to scientific pursuits and religious austerity, and lived in poverty. Freely associating with all the other tribes, they were thus able to know their sentiments, and to appreciate the justness of their complaints, and thereby to lay down such rules as were required, which often induced them to rectify the abuses that were practised by the second tribe. But after the expiration of more than

two thousand years, an absolute form of government came gradually again to prevail. The first class having been induced to accept employments in political departments, became entirely dependent on the second tribe and so unimportant in themselves, that they were obliged to explain away the laws enacted by their forefathers and to institute new rules according to the dictates of their contemporary princes. They were considered as merely nominal legislators, and the whole power, whether legislative or executive, was in fact exercised by the Rajputs. This tribe exercised tyranny and oppression for a period of about a thousand years, when Musulmans from Ghazni and Ghor, invaded the country; and finding it divided among hundreds of petty princes, detested by their respective subjects, conquered them all successively, and introduced their own tyrannical system of Government,—destroying temples, universities, and all other sacred and literary establishments. At present the whole empire, with the exception of a few provinces, has been placed under the British power; and some advantages have already been derived from the prudent management of its rulers, from whose general character a hope of future quiet and happiness is justly entertained.

[2. *Object of Tract.*]—"With a view to enable the public to form an idea of the state of civilization throughout the greater part of the empire of Hindustan in ancient days, and of the subsequent gradual degradation introduced into its social and political constitution by arbitrary authorities, I am induced to give, as an instance, the interest and care which our ancient legislators took in the promotion of the comfort of the female part of the community; and to compare the laws of female inheritance which they enacted, and which afforded that sex the opportunity of enjoyment of life, with those which moderns, and our cotemporaries, have gradually introduced and established, to their complete

privation, directly or indirectly, of most of those objects that render life agreeable.

[3. *Rights of Mothers.*]—"All the ancient lawgivers unanimously award to a mother an equal share with her son, in the property left by her deceased husband, in order that she may spend her remaining days independently of her children, as is evident from the following passages:—[here follow passages from *Vádnyawalkya*, *Kátyáyan*, *Náred*, *Vishnu*, *Vrihaspati*, and *Vyas*.] But the authors of the *Daya-bhag* and of the *Daya-tatwa*, the modern expounders of the Hindu law, have so limited the rights allowed to widows by the above ancient legislators, that the mother's right of inheritance, as interpreted by them, is reduced to almost nothing. * * * The consequence is, that a woman who is looked up to as the sole mistress by the rest of a family one day, on the next becomes dependent on her sons, and subject to the slights of her daughters-in-law. She is not authorized to expend the most trifling sum, or dispose of an article of the least value, without the consent of her son or daughter-in-law, who were all subject to her authority but the day before. * * *

[4. *Suicide of Widows.*]—"It is not from religious prejudices and early impressions only, that Hindu widows burn themselves on the piles of their deceased husbands; but also from their witnessing the distress in which widows of the same rank in life are involved, and the insults and slights to which they are daily subjected. so that, they become, in a great measure, regardless of existence, after the death of their husbands; and this indifference, accompanied with the hope of future reward held out to them, leads them to the horrible act of suicide.

[5. *Polygamy*]—"These restraints on female inheritance encourage polygamy,—a frequent source of the greatest misery in native families; a grand object of Hindus being to secure a provision for their male offspring, *the law, which*

relieves them from the necessity of giving an equal portion to their wives, removes a principal restraint on the indulgence of their inclinations in respect to the number they marry. Some of them, especially Brahmans of higher birth, marry ten, twenty or thirty women, either for some small consideration, or merely to gratify their brutal inclinations, leaving a great many of them, both during their lifetime and after death, to the mercy of their own paternal relations. The evil consequences arising from such polygamy, the public may easily guess, from the nature of the fact itself, without my being reduced to the mortification of particularizing those which are known by the native public to be of daily occurrence. To these women there are left only three modes of conduct to pursue after the death of their husbands : 1st. To live a miserable life, as entire slaves to others, without indulging any hope of support from another husband; 2ndly. To walk in the paths of unrighteousness, for their maintenance and independence; 3rdly. To die on the funeral pile of their husbands, loaded with the applause and honor of their neighbours. It cannot pass unnoticed that the number of female suicides in Bengal is almost as ten to one, compared with those in other provinces ; —which we may safely attribute to the greater frequency of a plurality of wives, and the consequent neglect in providing for their maintenance.

[6. *Second-marriage when lawful.*]—" This horrible polygamy is directly contrary to the law as laid down by ancient authors. *Yádnyawalkya* considered second-marriage, during the life of the first wife, allowable only under eight circumstances :—incurable disease ; barrenness [for eight years, or all children dead in the tenth year] ; or production of daughters *only* [during eleven years] ; deception [meaning no doubt, incontinence] ; the vice of drunkenness ; extravagance; manifestations of hatred, [mischievous conduct]; and the frequent use of abusive language. The causes spe-

cified by *Manu*, ch. xi. 80-1 [from which the *interpolations* are added] exactly correspond ; [and he moreover adds, in] v. 82.—' But she, who, though afflicted with illness, is beloved and virtuous, must never be disgraced, *though she may be superseded with her own consent*.'

[7. *Legislative check proposed*.]—" Had a magistrate, or other public officer, been authorized by the rulers of the empire to receive applications for sanction to a second-marriage during the life of a first wife, and to grant his consent, only on such accusations as the foregoing being substantiated, the above [Hindu] law might have been rendered effectual, and the distress of the female sex in Bengal, and the number of suicides, would have been necessarily very much reduced.

[8. *Rights of Sisters*.]—" According to the following *ancient authorities*, a daughter is entitled to one-fourth part of the portion which a son can inherit : [Here follow texts from, *Yádnyáwalkya*, *Vishnu*, *Vrihaspati*, *Kalyayan*, and from] *Manu*, ch ix, v. 118 :—' To the unmarried daughters let their brothers give portions out of their own allotments respectively : Let each give a fourth part of his own distinct share, and they, who feel disinclined to give this, shall be condemned.' * * * In the practice of our contemporaries, a daughter, or a sister, is often a source of emolument : Brahmans and Kayasths, so far from spending money on the marriage of their daughters or sisters, receive frequently considerable sums, and generally bestow them in marriage on *those who can pay most*; and I regret to say, frequently marry their female relations to men having natural defects, or worn out by old age or disease, merely from pecuniary considerations ; whereby they either bring widowhood upon them soon after marriage, or render their lives miserable. *They not only degrade themselves by such unmanly conduct*, but violate entirely the express authority of Manu and all other anci-

ent lawgivers. [Here follow texts from Manu:—ch. III., v. 51; and ch. IX., v. 98, and v. 100; and from] *Káshyap* — 'Those who, infatuated by avarice, give their own-daughters in marriage for the sake of a gratuity, are the sellers of their daughters, the images of sin, and the perpetrators of heinous iniquity.'

[9. *Women at present helpless.*]—"Both common sense and the law of the land designate such a practice as an actual sale of females; and the humane and liberal among Hindus lament its existence, as well as the annihilation of female rights, in respect of inheritance, introduced by modern expounders. They, however, trust that the humane attention of Government will be directed to those evils, which are chief sources of vice and misery, and even of suicide, among women. How distressing it must be to the female community, and to those who interest themselves in their behalf, to observe daily that several daughters in a rich family can prefer no claim to any portion of the property, whether real or personal, left by their deceased father, if a single brother be alive; while they are exposed to be given in marriage to individuals, who have already several wives and have no means of maintaining them.

[10. *Proposed remedy.*]—"Should a widow, or a daughter, wish to secure her right of maintenance, however limited, by having recourse to law, the learned Brahmans, whether holding public situations in the Courts or not, generally divide into two parties, one advocating the cause of those females, and the other that of their adversaries. * * * It was highly judicious in Government, to appoint Pundits in the different Zillah Courts and Courts of Appeal, to facilitate the proceedings of Judges in regard to such subjects; but as we can now fortunately find many European gentlemen, capable of investigating legal questions, with but little assistance from learned natives, how happy would it be for the Hindu community, both male and female, were they to

enjoy the benefits of the opinion of such gentlemen, when disputes arise, particularly on matters of inheritance. Lest any one should infer from what I have stated, that I mean to impeach, universally, the character of the great body of learned Hindus, I declare positively, that this is far from my intention. I only maintain that, *the native community place greater confidence in the honest judgment of the generality of European gentlemen, than in that of their own countrymen.* But, should the natives receive the same advantages of education that Europeans generally enjoy, and be brought up in the same notions of honour, they will, I trust, be found, equally with Europeans, worthy of the confidence of their country-men, and the respect of all men."

APPENDIX No. II.

THE WOMEN OF ANCIENT GREECE.

1. *Oriental influence*—"In crossing from Asia to Europe, we are at once arrested by the wondrous civilization of Ancient Greece, immeasurably transcending that of the most highly cultivated Oriental nations. Nevertheless, when we inquire what is the legal position of woman, the nearness of Greece socially, no less than geographically, to the Asiatic continent becomes immediately apparent. . . The detestable custom of confining women prevailed, with more or less strictness, throughout Greece; and, perhaps, its continuance in the absence of its usual cause—polygamy—may be ascribed to oriental influence, rendered more potent by means of the Greek colonies in Ionia. The rooms occupied by the women were, for the sake of greater privacy, always at the back, and often in the upper part of the house. The maidens were guarded in strong apartments, and even after marriage, the restrictions imposed on young women of the middle and higher classes, evinced a degree of jealousy befitting the lord of an Asiatic harem."

2. *Monogamy*—and the increasing respect for women consequent thereon,—"was the great and permanent distinction between the sexual relation of the Greeks, and that of most Eastern peoples; and was the immediate precursor of a still higher social existence to be developed in Italy, and afterwards spread over the Roman world" In the *heroic times*, observes Mr. Grote, "we find the wife occupying a station of

greater dignity and influence. . . She even seems to live less secluded, and to enjoy a wider sphere of action, than was allotted to her in historical Greece. . . A large portion of the romantic interest which Grecian legend inspires, is derived from women :—Penelopê, Andromakhê, Helen, Klytoemnestra, Eriphyle, Jokasta, Hekabê, &c., all stand in the foreground of the picture, either from their virtues, their beauty, their crimes, or their sufferings."

3. *Athenian notions.*—" It is remarkable that, during the progress of Greek civilization, the women of Athens did not advance, but rather retrograded. In the *Timaeus* of Plato, we find an idea of woman, which may justly be regarded as typical of Athenian opinions and Athenian laws concerning her. Assuming the doctrine of the transmigration of souls, Plato says :—' Of the men that were born, such as are timid, and have passed through life unjustly, are, we suppose, changed into women in their second generation ;' and he elsewhere remarks, that ' a woman's virtue may be summed up in a few words, for she has only to manage the house well, keeping what there is in it, and obeying her husband.' On this subject, Plato and Aristotle are wonderfully unanimous ; the latter asserting that the operations of nature tend to perfection even in the form of human being ; but if a male cannot be produced, owing to the resistance of matter, then a female is the result. . . Women were always in a state of *tutelage*, perpetually in the power, and subject to the direction, of their fathers, husbands, or other legally appointed guardians ; and, after the death of the father of a family, it was no unfrequent occurrence for the mother, ripened by age and experience, to find herself under the control of her own son. . . " Everything which concerned their lives, their happiness, or their rights," says Grote, " was determined *for them* by male relatives ; and they

seem to have been destitute of all mental culture and refinement."*

4. *The women of Sparta*, however, enjoyed much more personal freedom. "Xenophon and Plutarch," observes GROTE, "represent them as worthy and homogeneous companions to the men. The Lykurgean system, as those authors describe it, considering the women as part of the *state*, and not as part of the *house*, placed them under training hardly less than the men. Female slaves are good enough (Lykurgus thought) to sit at home weaving and spinning; but who can expect *a splendid offspring*,—the appropriate duty and mission of a free Spartan woman, from mothers brought up in such occupations?' Pursuant to these views, the Spartan damsels underwent a bodily training analogous to that of the Spartan youth. . . In like manner, the young women marched in the religious processions, sung and danced at particular festivals, and witnessed, as spectators, the exercises and contentions of the youth in the *agmes*; so that the two sexes were perpetually mingled with each other in public, in a way foreign to the habits, as well as repugnant to the feelings, of the other Grecian States." Grote quotes the assertion of Bishop Thirlwall that, notwithstanding, "Spartan *morals* were as pure as those of any ancient, perhaps of any modern, people." K. O. Müller remarks,—and the evidence, says Grote, as far as we know it, bears him out,—that love marriages, and genuine affection towards a wife, were more familiar to Sparta,

* It was intended to confine this Appendix to extracts from the works of K. O. Müller, and from Mr. Grote's History of Greece,—illustrating the general positions laid down in the text (sec. 17). But, meanwhile, the *Westminster Review* for October 1855 (No. xvi) has arrived, containing a valuable article—replete with curious and interesting information—on "The Position of Woman in Barbarism, and among the Ancients," from some of the passages in which, regarding Greece, the above three paragraphs are condensed;—but, otherwise, it was too late to afford me any assistance.

than to Athens; though in the former marital jealousy was a sentiment neither indulged nor recognised, while in the latter it was intense and universal.

5. *Among the Æolians*, also, the life and education of females was not, as at Athens, confined to the house. "There were women distinguished by their attainments, who assisted in instructing a circle of young girls, in the same manner as Socrates afterwards did at Athens young men of promising talents." There were also among the Dorians of Sparta noble and cultivated women, who assembled young girls about them, to whom they devoted themselves with great zeal and affection; and these girls formed associations which, in all probability, were under the direction of the elder women (*Müller's Dorians*, Bk. IV., chap. 4-5.). Such associations as these existed in the island of Lesbos, in the time of Sappho; "and were formed by girls who were studying to attain that proficiency in music or other elegant arts, that refinement and grace of manners, which distinguished the women around whom they congregated." It would seem that, not only Sappho, but many other women in Lesbos devoted themselves to this mode of life, as frequent mention is made by the poetess of her rivals. A great number of the young pupils (*μαθήτριαι*) were from distant countries, —as Anactoria of Miletus, Gongyla of Colophon, Eunica of Salamis, &c. "Though poetry was a part of Sappho's inmost nature, a genuine expression of the feelings by which she was really agitated, it is probable that with her, as with the ancient poets, it was the business and study of life; and as technical perfection in it could be taught, it might, by persevering instructions, be imparted to the young."

6. Many of the poems of SAPPHO, says Müller, related to her female friendships, and reveal the familiar intercourse of the *woman's chamber* (*gyno-konitis*,); —where the tender refined sensibility of the female mind was cultivated and impressed with every attractive form. It is obvious that this

attachment bears less the character of maternal interest, than of passionate love; as, among the Dorians in Sparta and Crete, analogous connections between men and youths, in which the latter were trained to noble and manly deeds, were carried on in a language of high-wrought and passionate feelings, which had all the character of an attachment between persons of different sexes. This mixture of feelings, which among nations of a calmer temperament have always been perfectly distinct, is an essential feature of the Greek character. Her compatriot Alcæus testifies that the attractions and loveliness of Sappho did not derogate from her moral worth, when he calls her—"violet crowned, pure, sweetly-smiling Sappho." The Ionic bard Anacreon, likewise, and Solon, the poet and legislator, speak of her with great respect and admiration. These genuine testimonies of contemporaries are altogether opposed to the accounts of the many writers who represented Sappho as any thing but an exemplary character; but later generations, and especially the refined Athenians, were incapable of conceiving or appreciating the frank simplicity with which Sappho pours forth her feelings; nor should it be wondered at that women, who had in any degree overstepped the bounds prescribed to their sex by the orientalized manners of Athens, should be represented by the licentious comic writers, as lost to every sense of decency, and be deemed legitimate objects of scurrilous jests and slanderous imputations.

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SYNOPSIS OF LECTURES.

I.—SAVIGNY'S GENERAL ANALYSIS.

1. Peculiar character of the *law of family*; *[what is meant by the *law of things*;]* supplemental to the incompleteness of the individual;—which shows itself in two different forms. 2. Each family relation maintains three inseparably united shapes; 3. Subordinate character of the *natural* element; 4. Importance of the *moral* element; its influence frequently overlooked: For instance, in the Roman law,—Savigny's observations; Also in the Hindu law, as remarked by Sir Thomas Strange; [Prof. Wilson's strictures on James Mill's notions regarding Hindu women.] 5. FAMILY RIGHTS: not only inter-personal *(inter personas)*; but also against the world at large *(adversus omnes)*; 6. Their proper juridical substance;—which embraces three considerations. 7. Operations of *Marriage* on other juridical relations. 8. External influences of the *Paternal* relation. 9. *Consanguinity*: Its indefinite character; Its influence on *Marriage* (sec. 30); on *Property*;—where it is twofold: upon *inheritance* (sec. 70, *note*); upon *maintenance* (sec. 72, et seq.) 10. *Quasi-domestic relations*, or 'artificial extensions of the family': always included in the "law of *domestic* persons"; (see sec. 61, *note*). 11. *Tutelage and Adoption*:—Tutelage of minors founded on a natural basis; language of the Roman law regarding; Adoption the converse of tutelage. 12. Origin

* Matter contained in the *notes* is thus distinguished throughout from that in the text.

of Adoption: Its religious character, among the Greeks and Romans in ancient times, and among the Hindus, (sec. 110); Its influence on the law of inheritance.

II.—OF THE MARRIAGE UNION.

13. Beau-ideal of the *Institution of Marriage*, as depicted by DR. WHEWELL; its influences, moral, social and political. 14. Abstract conception of a complete marriage; how defined in the *Institutes* of Justinian; National shortcomings: polygamy and concubinage. 15. *Syro-Arabic nations*:—Prof. Newman's observations regarding Hebrew polygamy; Dr. Whewell's remarks; Ordinances of the *Koran*. 16. *Hindu polygamy*:—'the supreme law' quoted by Manu; second wives how far allowed by the ancient law; [references as to modern usage;] customary law of the *Parsis* similar. 17. *Grecian notions*, regarding *polygamy*; [traditions of bigamy having, at one time, being allowed at Athens; community of wives proposed by Plato; modern communism]; *Position of woman*: among the Ionians and Athenians; among the Æolians and Dorians. [*Appendix No. II.*] 18. *Roman law*: the 'consort,' and the 'concubine'; *concubinage*, as regulated by Constantine and Justinian, quite distinct from *polygamy*. [DR. TAYLOR'S observations on the subject; couplet from the poet Plautus.] 19. Polygamy among the *Barbarians* of antiquity: [among the Germans, as recorded by Tacitus]; Influence ascribed to *Christianity*, by Grotius, and by Judge Story; observations of the American Professors, Chancellor Kent and Dr. Lieber. 20. Views of MONTESQUIEU (Sp. L., Bk. xvi,) regarding influence of climate;—early marriages; polygamy and its effects; 21. Oriental seclusion of women; domestic slavery and political despotism. 22. DR. PALEY'S enumeration of the bad effects of polygamy.

III.—CONTRACT OF MARRIAGE.

23. CAPACITY of parties to a contract :—Idiots, lunatics, &c., *physically* incapable ; [Ld. Mansfield's dictum regarding privilege of infants : how here applied, sec. 27] ; *Moral* incapacities : force, fraud, mistake, [*Bishop's Commentaries : Nullities of Marriage*] ; Political incapacities prescribed by the law of the state. 24. Peculiar character of the marriage-contract. 25. Infant marriages in India ; apparent absence of consent ; the contracting parties. 26. Essentials of the marriage-contract according to *Muhomedan law*, [*Vans Kennedy's Abstract*]. 27. Age of consent : Roman and English law ; [*void* and *voidable* marriages : Bishop.] Effects of both, or either, of the parties being under the legal age ; [*promises to marry*, in what cases binding : Stephen.] 28. Positive enactments may regard the *making*, the *effects*, or the *dissolution* of the contract ; also the *forms* of procedure. 29. *State preventions* may affect marriages of two different kinds : instances of the *excluding* circle ; Hindu cast-circles more circumscribed now than formerly ; (compare sec. 70). 30. THE PROHIBITED DEGREES : how for universally considered an obstacle ; [uniformity with regard to *lineal* relationship ; difficulty of fixing the exact limits in the *collateral* line : KENT'S observations ; marriages between *brothers and sisters* ; Prohibitions of the *Code Napoléon* ; how far it allows a dispensing power ; Opinion of DR. TAYLOR, as to the proper point at which to stop in collateral consanguinity ;] Hindu law ; Levitical and Mahomedan law ; the Civil, the Canon, and the Common law ; [what marriages are *void in England* from proximity of relationship, whether by *consanguinity*, or by *affinity* : Stephen.] 31. *Physical* grounds for preventing some marriages ; Other reasons for such prohibitions ;—which make affinity as great an obstacle as consanguinity . Bishop. 32. CONSENT : *Forms of procedure* how con-

nected with. 33. *What constitutes consent* : Bishop ; maxim of the Roman civil law; marriage *de praesenti* when complete,—qualification ; contract : *de futuro cum copulâ* : rule of evidence : (and see further in sec. 66).

IV.—HUSBAND AND WIFE.

34. POSITION OF THE WIFE:—*Roman law* : tutelage of women, married and unmarried ; 35. Ancient forms and effect of marriage, patrician and plebeian ; ownership acquired by possession ; [corresponding forms among the Hindus : *Brâhm*, *Asûr*, *Râkshas* ; and for *Gândharv*, see sec. 70.] ; How the law first allowed the *use* to be interrupted ; improved condition of the wife ; 36. *English* common-law theory of '*one person*' ; its application ; Policy of preventing spouses giving testimony for, or against, each other : exceptions ; [maxims in support of it adduced by Blackstone ; effect of recent statutes ; additional reason urged by Stephen ; Bentham's objections to the rule.] 37. *Wife's Coverture* : Its legal *incapacities* ; [right of action in husband's name : *Addison on Contracts*] ; Its *privileges* :—1st, in civil actions ; 2nd, in criminal law ; [husband's *coercion* only presumptive : *Russell on Crimes*.] 38. *Husband's power over* WIFE'S PERSON :—*Roman law* regarding corporal chastisement ; *English common-law* : power of correction claimed by ; when it first began to be doubted ; decision *in re Cochrane* ; [*Rights of Women* : condensed from chap. 16, of *Spencer's Social Statics*] ; *Hindu law* on the subject : Strange's comments. 39. WIFE'S PROPERTY :—*Roman law* : Husband's rights over wife's antenuptial *gift* ; limitations gradually imposed ; Wife's rights of property over husband's antenuptial *donation* how far restricted ; [Etymology and original meaning of *dower* ; its technical signification in English law ; object of the estate ; Indian Act xxix of 1839 ; Works on the

Law of Property as modified by *Marriage* : its divisions.] 40. *English common-law* doctrine as to *personalty* and *realty* ; wife's independent estate in contemplation of *equity* ; How far 'equity follows law' in cases of property *not* settled to wife's separate use ; Equity differs from the common-law (sec. 37) with regard to wife's *right to sue* ; rule of the ecclesiastical courts. 41. *Hindu law* : enumeration of *wife's property (stri-dhan* ;) differences of opinion as to *earnings of industry* and *gifts from strangers* ; [conflict of texts ; opinion of JAGANNATH, compiler of the *Digest* ; references for further consideration.] 42. *Mahomedan law* as to consequences of marriage : the theory different from the practice ; rules regarding wife's *necessaries*. 43. WIFE'S CONTRACTS :—*Husband's liability* how grounded ; the wife's agency *natural*, not *conventional* (compare sec. 61, *note*) ; the law on the subject as summed up by SMITH (*Law of Contracts*. Lec. x.) ; wife's necessaries. 44. How credit to a married woman came to be recognised in law (see sec. 37) ; separate means : Addison. 45. COMMUNITY, or nuptial partnership of the *Code Napoléon*, contrasted by STORY (*Conflict of Laws*) with the English law on the subject :—Cases governed by the 'rule of community' ; to what *kinds* of property it extends ; *liabilities* as to debts, &c. ; how *administered* ; restraints upon *alienation* ; modes and result of *dissolution* ; Civil law and Common law in America (and compare sec. 68, *note*.)

V.—DISSOLUTION OF MARRIAGE.

46. *Résumé* ; subject matter of present title. 47. *Civil* death of the husband ; unaccountable absence ; presumption as to duration of life,—Lord Ellenborough ; when the wife may be sued as a widow. [Reference to Mr. Addison's work, as to application of the *Law of Contracts* to *Marriage* ; method of treating the subject proposed.] 48. DIVORCE :—

Diversity of sentiment regarding; extremes of opinion; 49. *Roman law* of divorce; restrictions imposed by the Christian emperors. 50. *Hindu law*: its one-sided character; exceptions. 51. *Doctrine of Supersession*, as explained by Strange, grounds that *justify*; when barely *admissible*; when *illegal*, [its punishment, as interpreted by Jagannath]; rights and duties of superseded wife; misery of double marriage. 52. *Mahomedan law*: opinion of Sir Wm. Macnaghten; temporal impediments which check *repudiation*; [mode by which the wife is endowed (compare sec. 39); *muhr-misl* or proportionate dower.] 53. *English law*: two species of divorce; canonical impediments to marriage; how they differ from *civil* disabilities (compare sec. 27 et seq.). 54. *Divorce Bill*; on what grounds generally granted; usual provision accompanying it. 55. Divorce *a mensâ* when obtainable; what is meant by *alimony*;—when not allowed. 56. Reasons, adduced by PALEY, for the *indissolubility* of marriage; 57. Exceptions, in favor of the injured party, 'admitted by the law of nature'. 58. *The legislative question*, as stated by BISHOP (*Commentaries*, § § 277-287): Duties of Government with regard to marriage contracts; claims of a guilty party; concurrence of public policy and private right in the matter. 59. Divorce *a mensâ* how characterised; language of Lord Stowell; bad effects ascribed to the difficulties of obtaining divorce in England; [change in the English law of divorce with regard to *adultery*; how judged by the Roman civil law and by the *Code Civil* of Napoléon; Canonical dogma of absolute indissolubility; the sentence *a vinculo* not one of *dissolution*, but of *nullity*; probable origin of the *decree a mensâ*; how always qualified; Four main ingredients of the *English ecclesiastical law*, according to Dr. Burn; conclusion arrived at by Sir Erskine Perry, in *Ferozbai* v. *Ardeshir Khurshedji*.] 60. *Specific causes* for absolute

divorce, according to Bishop; difficulty of considering purely *mental* causes; chief precautions requisite in granting divorce.

VI.—FILIATION AND PARENTAGE.

61. The subject proposed: questions preliminary to the law of parent and child; filiation in its legal character resembles *marriage*; *Emancipation*: grounds of relaxation as regards the parental tie (compare sec. 60 on *divorce*, and see sec. 77 et seq.); general scientific aspect of the law of family; traces of Roman influence: [striking instance in point of classification:—legal position of *domestic servants* under the Roman system; the law regarding them how treated of by Blackstone, and by Stephen;—partial improvement in classification adopted by the latter commentator; to what department the relation of master and servant properly belongs;] 62. Mode of treating family rights, in the *Code Civil* of Napoléon;—which in another department is generally considered defective; Peculiar importance attached by the Roman law to the *patria potestas*; [proper signification of *potestas*, as distinct from *potentia*; origin and meaning of the word *dominion*; Greek synonym for *dominus*; how the *master of the family* rules his children and his wife, respectively, according to Aristotle; term used by the Romans to express the *superior* power of the law;] Subordinate place given to *marriage*, in the Roman civil law. 63. *Paternity of husband*:—General rule; in what cases the *Code Napoléon* allows a child *born during* marriage to be disowned by the husband; legitimacy of child *born after* dissolution of marriage; [limit of the Roman law as to the *ultimum tempus gestationis*; rule laid down by Coke; comments of Stephen;] 64. *Limitations to disclaimer* by husband; when the right to dispute the legitimacy descends to his heir. 65. *Proofs of filia-*

tion, according to the *Code Civil* :—' Act of birth ' ; Constant possession of character : principal facts which combine to establish its conformability ; in what cases proof may be given by witnesses ; from what *writings* it may commence ; disproof of *maternity*, or of *paternity* ; [English statute regulating *registration* of births, &c.] 66. *Evidence of legitimacy* : *English law* :—maxim as to presumption against immorality ; presumptive evidence of marriage ; presumption in favor of legitimacy ; maxims : ['*marriage proves the father*' : reason of the rule.—Montesquieu ; References on the question of legitimacy ;] Cases in which the presumption does not hold ; anciently not conclusive ; subsequent doctrine *infra quatuor maria* ;—when exploded ; the question how since then regarded, according to Kent. 67. LEGITIMATION : *Roman and English law* :—Four species of illegitimacy, according to the *civil law* ; Three modes of legitimating natural childern ;—two of which have counterparts in *English law* ; legitimation of *ante-nati*, by a subsequent marriage, when first recognised by the Roman law ; doctrine when established in the Canon law ; reason why it wac rejected at the Parliament of Merton. 68. The English law, regarding legitimation, why preferred by Blackstone to the Roman law ; further argument in its favor mentioned by Stephen ; [The civil law rule adopted, to its fullest extent, in the *Code Civil* of France ; other countries in which it obtains.] 69. *Rights of illegitimate children* :—Blackstone's remarks on the *Roman law* regarding maintenance ; How the *English law* provides for them.—STEPHEN : custody of the child ; when the *mother* is bound to support it ; means afforded of compelling the *father* to supply a fund for maintenance ; [Provisions of 7& 8 Vict, c. 101, and 8 & 9 Vict, c. 10.] ; *Disabilities* with respect to bequests and inheritance : upon what general doctrine founded. 70. HINDU LAW :—General rule regarding legality of *marriage* (compare sec.

29); how far it affects the legitimacy of *issue* therefrom; Civil law maxim, *quod fieri non debet, factum valet*;—its strict application according to Lord Brougham; Opinion of Ellis regarding offspring of *irregular* intercourse between persons of *same cast*;—Strange's objection; the *Gândharv* form of marriage (compare sec. 35, *note*); Offspring of *superior* mother and *inferior* father, how withdrawn from the influence of the above maxim;—distinction drawn by Lord Mansfield, in *R. v. Loxdale*; Position of child of *superior* father and *inferior* mother; modern *cast-usage* how far obligatory (?); Illegitimate children's right to *maintenance*; rights of *inheritance*; [references on the subject; Rule observed in present lectures regarding questions of SUCCESSION] 71. MAHOMEDAN LAW:—Presumption as to *parentage*; and as to *marriage*; the latter how defined—Macnaghten; lax rules regarding the *period of gestation*; decided *Case* in 3 Moore's Ind. App. 295.

VII.—PARENT AND CHILD.

72. MUTUAL OBLIGATIONS:—*Hindu law*: Reciprocal duties of parents and children, according to Strange; [*Duty of Maintenance*: texts on the subject; how far, and to what persons, it extends]; 73. *Mahomedan law*: Duty of protection how far obligatory on the *father*,—and on the *children*; distinction as regards the *mother*, according to the *Hidayah*; 74. Doctrine of the *Roman* civil law regarding *maintenance*; how children were to move for relief, in case of *disinherison*;—comments of Grotius,—Puffendorf,—and Blackstone; 75. Upon whom, and under what circumstances, maintenance is rendered obligatory by the *Code Civil* of France; 76. *English Law*: Absence of express obligation in the common law how accounted for, and how partly supplied; Maintenance of children how far compulsory by statute; corresponding duties towards

parents pointed out by Blackstone; The obligation of mutual protection how further recognised by law; [*Education of children*: Puffendorf's remark; General observations by Blackstone; nature of provision made by the law of England; further remark on the subject by Stephen.] 77. FATHER'S POWER: 1*st, over child's* PERSON:—*Roman law*: ancient import of the *patria potestas*; how it differed from the *dominica potestas*; (compare sec. 62, *note*;) improved condition of the child; origin of *emancipation*; 78. *Hindu law*: father's right of *selling*, for what purpose it might have been chiefly given; condition made *essential* by all the texts, according to Strange; usual *motive* for the sale; persons excepted from its operation by *Yâdnyawalkya*; [custom of *child-selling* in India; how far tolerated among Hindus and Mahomedans; observations of Celebrooke and of Sir William Macnaghten; see, however, *Appendix No I.*, sec. 8.]; 79. *English law*: How far the father's power extends—Blackstone; right of custody and education how far liable to control, according to Kent; and compare *note* to sec. 85; [Reference as to application of the law of *habeas-corpus* to family relations in India.] 80. 2*nd, over* PROPERTY *of child*:—According to the more ancient *Roman law*; important class of exceptions; [child's *peculiar* estate:—original character of; subsequent extensions; terms used by the commentators to express the two principal species of *peculium*; distinction drawn in the *Institutes*.] 81. *Hindu law* on the subject, as laid down by *Manu* and others; comments of Strange; 82. *English law*: general rule as to *child's earnings*; [father's claim to the *value of child's services* how far, according to Kent, *beyond doubt* (?); to what further extent it has generally been assumed, and why; cases in which *Emancipation* may be inferred]; Rights and liabilities with regard to child's *independent* estate; 83. *Code Civil*: usufruct of child's property by parents,—during marriage, after its dissolution,

in case of divorce; how long it continues; to what kinds of property it does *not* extend; 84. *Delegation of paternal power*: Artificial extension, by *English statute*, of the *patria potestas* beyond the father's life; [corresponding duty not obligatory on the father; Blackstone's observations on the subject;] partial delegation of paternal authority to persons *in loco parentis*. 85. MATERNAL AUTHORITY; (*a*) *During father's life*; [*Custody of children*: *comparative rights as between parents*:—right of custody whence derived; *husband's* claim why, in general, preferable; when necessary to assert its superiority; cases in which *wife's* right ought to prevail over it; Two principles which ought to *control* claims of parents; leading consideration;—how far it harmonises, and when in conflict, with parents' rights; Principles summed up.—*Bishop*]; Recent English statute recognising mother's natural right of custody; (*b*) *After father's death*: right of custody; *consent to child's marriage*: [former unsatisfactory state of the law on this subject; subsequent alteration.—*Addison*]; common-law right of *guardianship* how far controlled by statute;—provisions of the *Code Civil* on the same subject; 86. *Mahomedan law*, as to the custody and care of *male* and *female* children, respectively.

VIII.—MINORITY AND TUTELAGE.

87. *Majority*: why the laws regarding vary; periods at which fixed in the principal states of Christendom. [The law regarding *minors* in Scotland differs from that which obtains in England; how the difference might be removed; other reasons, according to Mr. Levi, which render *reform*, on the subject desirable.] 88. *Hindu law*: General rule, as stated in *Morley's Digest*; Doctrine of the Bengal jurists as to full age of males; alteration introduced by the Company's Regulations; Import of the customary cast-law of

Western India on the subject ; Girls when of age ; tutelage of women ; [Terms applied to minors, in the various stages of infancy.—Colebrooke.] 89. *Mahomedan law :* General rule, as stated by Macnaghten ; subdivisons of minority ; Vans Kennedy's remarks ; earliest period of puberty ; [*Ages of Man* : among the Greeks and Romans :—Solon's division of human life ;—the age proper for *marriage* ; How far adopted by the Canonists ; Civil law division ; 'full age of *puberty*' ; full *majority*.] 90. TUTELAGE, as expounded in the *Institutes* (Lib. I. tit. XIII—XXVI) :—Leading distinction between the offices of *tutor* and *curator* ; why a 'guardian *ad litem*' (sec. 92) was a *curator* ; *tutors by testament* and *tutors legitimate* ; (compare *English law* in sec. 85 ;) How a father might become tutor of his own child. 91. *Curation* : How far optional with *adolescents* ; *Pupils* when freed from *tutela* ; How far the XII. *Tables* provided for the appointment of *curators* ; ordinance of Marcus Antoninus ; further extension of curation in the *Institutes*. 92. INFANTS—under *English law* : their *privileges* and *disabilities* ;—reason of the latter, according to Blackstone ; How infants may sue and be sued ; chief application, according to Stephen, of the maxim as to *no laches* ; Legal *incapacity* ;—where it does *not* exist, and why ; Provisions of 13 & 14 Vict., c. 60, as to conveyance of land possessed by infants. 93. *Qualified power of contracting*.—Addison :—*Penal* obligations ; Contracts for sale of personal apparel ; for borrowing of *money* ;—when, and how, an action lies for the latter ; (and compare sec. 97 ;) *Account stated* : presumption of the law regarding ; (and see under *Ratification*) ; *Trade contracts* : why considered voidable ; Mercantile instruments ; Deeds. 94. *Infancy a personal privilege* : what is meant thereby ; *want of reciprocity*, why no answer to an action by an infant ; [*Roman law* : *privilege of pupils*, as expounded in the *Institutes* (Lib. I, tit. XXI) :—*authorisation* of tutors

when requisite; general rule ;—its application to cases of reciprocal obligation ; Further explanation by Sandars : reclaiming of property by original owner ; (compare sec. 96 ;) *executory* contracts.] 95. *Contracts for necessaries* : when *not* binding ; when binding ;—reason of the rule ; (and see sec. 82, *note*) ; privilege as regards *price* of necessaries ; 96. *What are necessaries* (compare sec. 43, *note* ;) many things which *cannot be* necessary ; when the right of property revests in the vendor ; *Privilege of non-age* how f r, in the opinion of Paley, allowed by *natural* justice ; 97. *Ratification*, as regulated by 9 Geo. IV., c. 14 ;—what the statute requires to be evidenced ; its provision as to *mode of signature* different from that of the Statute of Frauds ; effect of such ratification ; instances : *borrowing of money*; *account stated* ; Principle of the rule, as explained by Parke B., in *Williams* v. *Moor*. 98. APPOINTMENT OF GUARDIAN : *Hindu law* :—upon whom, according to Strange, the *power* of selection devolves ; mode of selecting prescribed ; the *mother's* connexion with the guardianship ; 99. *Mahomedan law* : choice of guardian ; mother's natural right of custody how far forfeited by a subsequent marriage ; competency of parties to undertake the offices of *curator* and *tutor*, respectively ; 100. *Roman law* : Principle of selection ; objection of English lawyers, as stated by Blackstone ; Lord Macclesfield's opinion ; 101. *English law* : How the care of infants devolved on the judges in equity (compare sec. 98) ; *ward of the court* ; in what cases a guardian will be appointed for the person and estate of an infant ; when the court will not interfere ;—reason for non-interference, as stated by Lord Eldon.

IX.—ADOPTION.

102. ROMAN LAW : *forms of procedure* :—importance of the ceremony in ancient times ; *Arrogation* : how origi-

nally effected ; process latterly substituted for the consent of the *curiae* ; probable mode of arrogating when the parties were not of the patrician *gentes* ; *Adoption* : its specific import ; procedure by *mancipatio* and *in jure cessio* ; simple form substituted by Justinian ;—*Rescriptum principis* and *imperium magistratûs* ; 103. *Age and sex of parties* :—positive rule regarding age ; further usual observance , exceptions to the maxim 'adoption follows nature' ; Adoption by *women* ;—when the '*indulgence*' was first allowed ; nature of such adoption ; 104. *Effect of adoption*, before the time of Justinian : reciprocal rights as to *property* ; influence on *marriage*, as regards the prohibited degrees ; what is meant by the qualification in the *Institutes* (I, tit. XI 8) that the adopted son "is assimilated, *in many points*, to a son born in lawful matrimony" ;—difference between *agnati* and *cognati* ; 105. *Changes by Justinian* :—rights allowed in cases of adoption by strangers *(extraneae personae)* ; when '*nature and adoption concur* in same person', and result thereof. 106. CODE NAPOLEON : *modern* features of the *Institution* as presented therein ; [*Law of England* : with regard to Adoption—Dr. Hallifax ; usage which retains traces of the custom—Strange.] 107. *Capacity of parties* : circumstances under which adoption is permitted ; in favor of whom it may be exercised ; *age* of person to be adopted ; *consent* of spouse of the adopter, and of parents of the adopted ; 108. *Effects of the contract* : as regards *name* and *family* ; prohibitions as to *marriage* ; rights of *succession* ; 109. *Officious Tutelage* : to whom allowed ; age of the *pupil* ; rights and obligations of the *tutor* ; subsequent *adoption*. 110. HINDU ADOPTION : its great antiquity ;—inveteracy of Custom in India ; 111. *Religious character* of the Institution, as expounded by Strange ; importance attached to *male issue* ; different sorts of sons ; adoption a *right*, not a *duty* ; 112. *Essentials of the contract* :—Right to adopt in *husband* ; in *wife*,

and in widow ;—difference of doctrine, between the schools, as to necessity of *husband's authority* for widow's adoption ; Points to be attended to, in selecting a boy for adoption : *cast* ; *relationship* ; relative *age* of parties ; *year* for adoption ;—upon what it chiefly depends ; *Consent* of boy how far necessary ; 113. *Effects of adoption*, according to Jagannâth ; reciprocal rights and duties,—Strange ; effect of an *after* [illegible] *son* on the adopted son's right of *inheritance* ;—influence on *marriage*.

THE END.